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No. 709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, Deceased,

Petitioner,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

PAGE

Jurisdiction 2

Questions Presented 2

Statutes Involved 4, 1a

Statement 4

Reasons for Granting the Writ 13

Conclusion 20

Appendix A Statutes 1a

Appendix B Opinion and Judgment Below 4a

Citations.

Cases.

American Car & Foundry Co. v. Brassert, 289 U.S. 261, 53 S.Ct. 618 ..... 7, 18

Black v. New York & New Haven R.R., 193 Mass. 448 17

Butler v. Whiteman, 356 U.S. 271, 78 S.Ct. 734 13

Cortes v. Baltimore Insular Line, 287 U.S. 367 7

Coryell v. Phipps, 317 U.S. 406, 63 S.Ct. 291 7

Farrell v. United States et al., 336 U.S. 511, 69 S.Ct. 707 18

Guzman v. Pichirilo, 369 U.S. 698, 82 S.Ct. 1095 (1962) 13

Harris v. Pennsylvania R.R. Company, 361 U.S. 15, 80 S.Ct. 22 13

Kernan v. American Dredging Company, 355 U.S. 426, 78 S.Ct. 394 ..... 7, 14

PAGE

La Bourgogne Deslions v. Compagnie General, 210 U.S. 95, 122, 28 S.Ct. 664, 673 19

Lake Tankers Corporation v. Henn, 354 U.S. 147, 77 S.Ct. 1269 14

McAllister v. United States, 348 U.S. 19, 75 S.Ct. 6 ..2, 13

McDonough v. Buckeye Corp., 103 F. Supp. 473 aff'd C.A. 6 1952, 200 F. 2d 558 .....8, 17

Miner et al v. Atlass, 363 U.S. 641, 80 S.Ct. 1300 .... 2, 6

Moore-McCormick Lines Inc. v. Richardson, C.A. 2 1961, 295 F. 2d 583 20

National Airlines v. Styles, C.A. 5 1959, 268 F. 2d 400 20

Olson, Administratrix v. New York Central Railroad Co., C.A. 2 1965, 341 F. 2d 233 17

Panor v. Northwestern Elevated Railway Company, 228 Ill. App. 162 17

Penn v. Chicago & Northwestern Railway Company, 335 U.S. 849, 69 S.Ct. 79 13

Petition of Midwest Towing Company (N.D. Ill. 1962), 203 F. Supp. 727, 733 aff'd C.A. 7 1963, 317 F. 2d 270 .....8, 20

Petition of New York (C.A. 2 1964), 332 F. 2d 1006 .. 20

Powers v. New York Central Railroad Company, 251 F.2d 813, Dissent: 818-819 20

Rautbord v. Ehmann, C.A. 7 1951, 190 F. 2d 533 ....8, 19

Robinson v. Northeastern Steamship Co., 228 F. 2d 679 9

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 77 S.Ct. 443 13

Sadler v. Pennsylvania Railroad Company, 159 F. 2d 784 15

PAGE

Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 76 S.Ct. 608 13

Smith v. United States, C.A. 4 1964, 336 F. 2d 165 8

Tennant v. Peoria and P.U. Railway Co., 321 U.S. 29, 64 S.Ct. 409 13

The Virginian, 264 F. 986 19

Webb v. Illinois Central Railroad Company, 352 U.S. 512, 77 S.Ct. 451 13

Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413 13

STATUTES.

28 U.S.C. § 1254(1) 2

46 U.S.C. § 688 ..... 2, 4, 13

46 U.S.C. §§ 183-189 4

45 U.S.C. §§ 51-60 ..... 4, 13

REGULATION.

46 C.F.R. § 25.25-15(a) 2, 4, 15

RULES.

Rule 51, of the Supreme Court Rules in Practice of Admiralty and Maritime Cases 3, 5, 7

Rule 54, of the Supreme Court Rules in Practice of Admiralty and Maritime Cases 5

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on June 30, 1965.

CITATIONS TO OPINIONS BELOW.

The findings of fact, conclusions of law and judgment order of the District Court are unreported and appear at pages 71-83 of the Appendix in the Court of Appeals accompanying this Petition. The opinion of the Court of Appeals printed in Appendix B hereto, *infra*, p. 4a, is reported in 350 F. 2d 592.

FORMER OPINION.

A former opinion of this Court on a collateral phase of this case is reported in *Miner et al.* v. *Atlass,* 363 U.S. 641.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 30, 1965. On July 9, 1965, the Court of Appeals entered an order extending the time for filing a petition for rehearing to July 30, 1965. A timely petition for rehearing, filed July 29, 1965, was denied on September 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. When a district judge sitting in Admiralty, without a jury, has found an employer liable under the Jones Act (46 U.S.C. §688) for the deaths of his seamen-employees proximately caused by failure to provide a safe means of ingress to the vessel and the proofs with reason justify the district judge's conclusion that employer negligence played some part in producing the deaths, has the Court of Appeals in reversing the district judge and reaching its own conclusion that the seamen's deaths "were the result solely of their own gross misconduct" applied the standard of review required by *McAllister* v. *United States,* 348 U.S. 19, 20?

2. When an applicable Coast Guard regulation provides that "the life saving equipment on all vessels shall be so placed as to be readily accessible" and there is uncontradicted evidence that there was no life saving equipment in the vicinity of the 32 inch unbridged gap between the shipyard dock and the railbed of a marine railway upon which the vessel was temporarily located and

into which a seaman returning to the vessel fell and drowned, did the district judge properly reduce damages by reason of contributory negligence and did the Court of Appeals properly deny any recovery to the seaman's personal representative?

3. Does the conduct of a seaman in walking to a tavern ashore in the company of the employer's agent in charge of the crew and other crew members and there drinking alcoholic beverages and becoming helplessly intoxicated, bar the personal representative of the seaman from any recovery for the subsequent drowning of the seaman in such condition while returning to the vessel, or does the intervening agency of fellow crew members in taking the helpless seaman back to the vessel operate to render such conduct a remote cause, permitting full recovery if employer negligence played any part in the drowning?

Other issues were presented to the Court of Appeals but were not passed upon and although not forming the basis of this petition are believed to present important subsidiary questions. These are as follows:

(1) Does the Limitation of Liability Act protect the owner of a pleasure yacht who was also its master and operator from failure to perform his non-delegable duty of furnishing his employees with a safe place of employment when the owner knew or had an opportunity to know of hazardous conditions for access to his pleasure yacht and prior to the drownings of two of his employees, he left the vessel in charge of his agent, if at the time of the drownings of his employees he was not physically present?

(2) Does the requirement of Rule 51 of the Supreme Court Rules of Practice in Admiralty and Maritime Cases that an owner claiming the benefit of limitation of liability

"shall set forth the facts and circumstances on which limitation of liability is claimed" preclude the allowance of limitation on a petition which fails to allege either want of privity and knowledge or any facts from which such want of privity and knowledge could be found?

(3) May not a district court sitting in admiralty properly allow prejudgment interest with respect to part of damages not representative of future losses when the damages are based on claims under the Jones Act?

STATUTES AND REGULATIONS INVOLVED.

Statutory provisions involved are the Limitation of Liability Act, 46 U.S.C. §183-187 and the Jones Act, 46 U.S.C. §688, which incorporate by reference the Federal Employee's Liability Act, 45 U.S.C. §51-60. A Coast Guard Regulation, 46 CFR §25.25-15(a) is also involved. Their pertinent text is set forth in Appendix A, *infra*, pp 2a.

STATEMENT*

On April 22, 1957, H. Leslie Atlass, vice-president in charge of the Chicago office of Columbia Broadcasting System and the owner of a large 101 foot pleasure yacht brought a proceeding in admiralty in the United States District Court for the Northern District of Illinois under the Limitations of Liability Act, 46 U.S.C. §§ 183-189, for exoneration from or limitation of liability under the Jones Act, 46 U.S.C. §688, for the death by drown-

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* Abbreviated references are to the Appendix (App), Supplemental Appendix (Supp. App.) Reply Brief Appendix (Reply App.) filed for use of the Court below, to the Transcript of Proceedings (Tr.) part of the record below and to the Claimants' Exhibits (Ex.)

ing on October 26, 1956 of two seamen employed by him. The petition alleged, pursuant to Rules 51 and 54 of this Court's Rules of Practice in Admiralty and Martime Cases, that petitioner herein had theretofore on March 22, 1957, filed in the same district court an action under the Jones Act. (App. 4)

The seamen's personal representatives, one being petitioner herein, the other being petitioner in Number ....., appeared as claimants (App. 7, 9) and answered (App. 8, 10) alleging that the drownings were proximately caused by the negligence of their employer in failing to provide a safe, adequately lighted means of ingress and in failing to take proper and adequate care and control for the seamen's safety (App. 12-13). After a trial in 1963 and 1964 the district judge, sitting in admiralty without a jury, found that Clem Muth, petitioner's decedent, while returning to the vessel (Reply App. 1, Tr. 1665) as alleged in the owner's petition (App. 4) fell between the shipyard dock and the railbed of a marine railway (App. 76) where the yacht had been temporarily placed for repairs during the voyage (App. 73) and that the other seaman, Kurt Darr, jumped in to try to save him (App. 76) and that both drowned (App. 71). The district judge found that the decedents were seamen within the meaning of the Jones Act at the time of their deaths (App. 73, 77, 79); that access to the railbed from shore was hazardous, particularly at night which was when these seamen drowned (App. 75); that the lighting of the dock, walkway and railbed at the time of the drownings was insufficient (App. 77); concluded that an employer is liable under the Jones Act for the death of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel; that this duty extends to an area in close prox-

imity to the gangway such as the place where the seamen drowned (App. 79, 59) and that respondents, as the employer's personal representatives,* were liable to the claimants (App. 80-81).

The district court made the following finding with respect to contributory negligence:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and railbed and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death." (App. 77)

The district judge accordingly reduced petitioner's proven damages to $58, 527.49 (App. 82)

Atlass had been present at the vessel when it was placed upon the marine railway on October 23, 1956 (App. 17, 22, 26, 28) and knew, or had an opportunity to know, of the hazardous conditions for access both during the day and at night. (App. 30, 31, 49). On October 24, some 34 or 36 hours prior to the drownings, Atlass returned to Chicago. (App. 61) The district judge found that "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the dock and railbed as it existed at the time of the drownings" (App. 78) and allowed respondents limitation of liability to the value

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* H. Leslie Atlass, the owner of the vessel, died on November 18, 1960, (App. 1) which was after the Court's decision in *Miner* v. *Atlass,* 363 U.S. 641, but before the amendment to the Admiralty rules in 1961 permitting depositions as in Civil cases.

of the vessel, determining that petitioner's pro rata share was $18,422.13. (App. 78, 80, 83) The district judge explained "that is the basis of the conclusion that he wasn't responsible; that he had no privity or knowledge." (Tr. 1655-1657, Appellants' Brief 37, Petition for Rehearing 5)

Petitioner and Mollie Darr, administratrix of the estate of Kurt Darr, appealed to the United States Court of Appeals for the 7th Circuit contending as follows:

(a) The registered owner and master of a pleasure yacht who knew or had an opportunity to know of the hazardous conditions for ingress, and failed to do anything about them, but left the yacht and the crew in charge of his agent was not entitled to limit his liability merely because at the time of the drownings he was not physically present. *American Car & Foundry Co.* v. *Brassert,* 289 U.S. 261, *Coryell* v. *Phipps,* 317 U.S. 406; *Cortes* v. *Baltimore Insular Line,* 287 U.S. 367. (Appellants Brief 19, 24, 26, 32-35); (b) The petition for limitation of liability which failed to allege any want of privity or knowledge or any facts and circumstances from which such want of knowledge or privity could be found was insufficient. Rule 51 of the Supreme Court Rules of Practice in Admiralty and Maritime Cases (Appellants Brief 20, 26, 39-40); (c) An employer may not have a reduction of damages by reason of contributory negligence on the part of the decedent seamen when a cause of the seamen's deaths is the employer's failure to comply with a Coast Guard regulation providing that lifesaving equipment shall be readily accessible. *Kernan* v. *American Dredging Co.* (1958) 355 U.S. 426. (Appellant's Brief 20, 27, 41-43); (d) A seaman who in the company of his employer's agent and the chief engineer of the vessel becomes helplessly intoxicated and is taken

to the hazardous boarding area of the vessel in such helpless condition and falls in and drowns cannot, as a matter of law, be charged with contributory negligence, his own conduct being rendered remote by an intervening agency. *McDonough* v. *Buckeye Corp.*, 103 F. Supp. 473, aff'd (CA 6 1952) 200 F. 2d 558. (Appellants Brief 20, 29, 49-52); (e) Knowledge on the part of a seaman that to return to the vessel he would have to do so by a hazardous route, no safe way being provided, is not evidence of contributory negligence. *Smith* v. *United States* (C.A. 4 1964), 336 F. 2d 165 (Appellants Brief 28, 43); (f) Prejudgment interest may be allowed in admiralty cases with respect to that part of the damages based on loss of support to the date of judgment. *Petition of Midwest Towing Co.*, (N.D. Ill. 1962) 203 F. Supp. 727, 733, Aff'd (C.A. 7, 1963) 317 F. 2d 270. (Appellant's Brief 21, 29, 52-53)

A cross-appeal by respondents herein urged that the district court "fell into error in determining that there was any proximately causative negligence but that of Muth and Darr" (Brief of Appellees and Cross Appellants, p. 78). Answering the appeal, respondents urged "Privity and knowledge means more than mere negligence. It requires personal participation of the vessel owner and imports actual knowledge causing or contributing to the loss." citing *Rautbord* v. *Ehmann* (C.A. 7, 1951), 190 F. 2d 533, an opinion by Judge Major. (Brief of Petitioners-Appellees and Cross Appellants, pp. 39, 61)

The Court of Appeals, in an opinion by Judge Major, reversed the district judge on the cross-appeal and, drawing from language in maintenance and cure cases and relying on decisions in which the *trial* court had found no employer negligence held that the deaths of the two sea-

men "were the result solely of their own gross misconduct"; and held that the District Court erred in refusing to exonerate Atlass of all liability. (Appendix B, *infra*, p. 20a)

The second paragraph of the opinion of the Court of Appeals demonstrates its understanding of the basis of decision of the district judge, i.e., that Atlass was liable for the deaths of his seamen-employees proximately caused by his negligence in failing to provide a safe means of ingress to and egress from the vessel. (Appendix B, *infra*, p. 4a) However, subsequently, seizing on the "finding" that "Atlass *personally*, who was in Chicago, was without responsibility" which, the district judge explained was a conclusion that Atlass being in Chicago was without privity or knowledge, the Court of Appeals assumed that the district judge must have based his finding of liability solely on the negligence of the employer's agents in taking Muth in a helpless condition to the dock area. (Appendix B, *infra*, pp. 13a, 15a) The Court of Appeals held that such negligence on the part of the employer's agents could not be imputed to the employer as taking a helpless seaman back to his vessel was not within the scope of the agent's employment. *Robinson* v. *Northeastern Steamship Corp.*, 228 F 2d 679, 681. (Appendix B, *infra*, p. 14a)

The Court of Appeals observed parenthetically that "there was no proof that Muth was attempting to cross the gap" at the "unusual point" from which he entered the water. (Appendix B, *infra*, p. 9a)

The owner's petition had alleged that the drownings occurred while Muth and Darr were "apparently returning to the vessel." (App. 4) The only eyewitness to the occurrence was Smith, the chief engineer of the vessel

who was following three or four steps behind Muth and Darr, (App. 50-51, 76) and who testified that he did not know whether Muth was attempting to cross over to the marine railway platform or not. (App. 53) The 32 inch gap over which Muth had to cross to the railbed extended the entire length of the railbed and as the district judge observed "there were probably an infinite number of ways depending upon how you compute it, say you could get on anywhere on the whole starboard side from the walkway to the dock." (Supp. App. 119) While there were an infinite number of points from which to cross from the walkway to the railbed, none were found safe by the district judge. (App. 75) There was no gangplank spanning the 32 inch gap. (App. 18, 20, 32) There was no safe place to cross and no proper place indicated. (App. 75) There was no evidence that Muth entered the water at "an unusual place" or that there was a "customary place". He fell opposite a point between the first and second stanchions where there were no crossbars. Crossing from the next 15 feet along the walkway would have been more hazardous because of two crossbars intersecting at a height of 5½ feet, which were between the 15 inch wide stanchions. (App. 74)

The Court of Appeals found that particular aspects of the conditions which the district judge had found rendered access to the railbed from shore hazardous could not have contributed in whole or in part to the drownings. (App. B, *infra*, pp. 16a-18a). With respect to the obstructions on the railbed, scaffolding, debris and other litter which prevented safe access to the vessel by means of the inshore end of the railbed (Ex. 42, App. 75) (used when something heavy was being carried (Supp. App. 124)) and which may have caused Muth to be brought along the route usually taken which required the crossing of the 32 inch

unspanned gap, the Court of Appeals found that since the seaman did not attempt to return by the obstructed inshore end it could not have contributed in whole or in part to the drownings. (App. B, *infra*, p. 16a) The Court of Appeals found that neither the timbers and planks which were stacked on the walkway in the shadow of a wall, and which received no light (Supp. App. 97) and necessarily narrowed the walkway, nor the power line which lay across the walkway (Ex. 42, App. 17, 32), could have interfered with Muth or Darr as they proceeded together on the walkway on the east side of the gap. (App. B, *infra*, p. 17a).

The Court of Appeals also undertook to review some of the evidence with respect to the quality of light (App. B, *infra*, p. 17a) and contrary to the district judge's finding made its own finding that the illumination was sufficient for normal and ordinary use and that "no amount of illumination could have saved Muth and Darr from their own folly. That could have been accomplished only by placing a cover over the gap from end to end." (App. B, *infra*, p. 17a).

The finding of the district judge that the lighting was inadequate was based upon the testimony of two expert witnesses (Supp. App. 82, 149-150). The respondent's expert witness did not disagree as to the quantity of light available, nor the fact that the interior building lights, which were the only lights available and were not designed for exterior lighting (Supp. App. 149) being blocked by a wall, could not light the easterly three feet of the walkway (Supp. App. 97). His opinion was that highway and street rather than shipyard minimum lighting standards were appropriate, (Supp. App. 115-116) but such standards were not appropriate (Supp. App. 150).

Mendel, one of the crew members, testified that "there wasn't too much light that did come through the windows; (Supp. App. 25) that the light on the west margin of the dock and the east margin of the railbed "wasn't good, you know, distinct or plain"; "that you more or less took a step over, hoping you would make it" (App. 19). Wasilas, another crew member, testified that "the light was very bad"; (App. 24) that when he came off the boat in the unsuccessful rescue attempt he "heard Smith's voice in the darkness," that he went over to "where I heard the voice and Smith had a flashlight in his hand." (App. 25) Smith admitted that prior to the drownings he had used a flashlight going on and off the vessel. (Reply App. 2)

Yet the Court of Appeals found that there was no basis for a reasonable inference that insufficient lighting of the walkway was a cause, in whole or in part, of the fatal occurrence. (App. B, *infra*, p. 19a)

The Court of Appeals also found that two other seamen who jumped in the gap in an unsuccessful rescue attempt and did not drown had no difficulty in swimming to safety (although the water felt like an iceberg (App. 19) and one of them testified "It was difficult but we managed to get up" (Supp. App. 73)) and that this fact contrasted with the fact that Muth and Darr did drown in ten to fifteen feet of water (App. 74) required the "inescapable conclusion" that the drowning of the latter "was the result of their intoxicated condition, induced by their own voluntary acts." (App. B, *infra*, p. 20a)

In view of its conclusion that respondents were entitled to exoneration the Court of Appeals did not consider the other issues discussed in the briefs. (App. B, *infra*, p. 20a)

REASONS FOR GRANTING THE WRIT

1. The court below has decided a federal question in a way in conflict with the applicable decisions of this Court.

A fair examination of the record and analysis of the opinion of the Court of Appeals readily reveals that the Court failed to apply the standard of review required by *McAllister* v. *United States*, 348 U.S. 19, 20 and *Guzman* v. *Pichirilo*, 369 U.S. 698, 702.

Although the proofs justified with reason the findings of the district judge that employer negligence played some part in producing the deaths of Muth and Darr, the Court of Appeals drew its own inferences and own conclusions from the evidence and rejected evidence and reasonable inferences therefrom which substantially supported the district judge's findings.

This Court has been vigilant in overseeing decisions in which appellate courts have improperly reversed factual findings in Jones Act and F.E.L.A. cases. *Tennant* v. *Peoria & P.U. Railway Company*, 321 U.S. 29; *Penn* v. *Chicago & Northwestern Railway Company*, 335 U.S. 849; *Webb* v. *Illinois Central Railroad Company*, 352 U.S. 512, (the foregoing three cases being reversals of opinions below by Judge Major); *Wilkerson* v. *McCarthy*, 336 U.S. 53; *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500; *Harris* v. *Pennsylvania R.R. Company*, 361 U.S. 15; *Schulz* v. *Pennsylvania Railroad Company*, 350 U.S. 523; *Butler* v. *Whiteman*, 356 U.S. 271.

On occasion, this Court has exercised its oversight with respect to the findings of a district judge sitting in admiralty without a jury. *McAllister* v. *United States*, 348 U.S. 19, 20, *Guzman* v. *Pichirilo*, 369 U.S. 698, 702.

The Congressional scheme of legislation embodied in the Jones Act specifically guarantees the right of trial by jury. (App. A, *infra*, p. 2a) Yet an employer who is a vessel owner is in a position to circumvent that right and, until recently, the right to deposition discovery, through a proceeding for limitation of liability, heard by the court without a jury. Congress did not intend for Jones Act employers who happen also to be vessel owners to have the additional advantage of having unfavorable decisions retried before courts of appeal, certain of whose members persist in their refusal to accept this Court's view that the Jones Act and F.E.L.A. embody a system of federal statutory negligence law. It would be an anomaly if this Court limited its supervisory powers to protecting the integrity of a jury's verdict, but permitted a Court of Appeals to make its own findings when the findings of the district judge sitting in admiralty without a jury were not "clearly erroneous." This is a proper case for this court to "exercise its obligations to effectuate the present Congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction."

The Limitation of Liability Act was never intended to become an "offensive weapon." *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147, 152-153.

2. It is believed that the decision below is in conflict with an applicable decision of this Court in another respect:

In *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431, this Court held that even "in the absence of any showing of negligence, the Jones Act—which in terms incorporates the provisions of the F.E.L.A.—permits recovery for the death of a seaman resulting from the violation of a statutory duty."

An applicable Coast Guard regulation provided as follows:

> "The life saving equipment on all vessels shall be so placed as to be readily available." 46 C.F.R., §25.25-15(a)

The evidence established that there was no life saving equipment in the vicinity of the open space between the walkway and the marine railway. (App. 33) Two life rings which had been located on the starboard side of the vessel had been removed when the vessel was placed on the rail. (App. 21) What was said in *Sadler* v. *Pennsylvania R.R. Co.*, (C.A. 4 1947), 159 F. 2d 784 at 786, is peculiarly applicable:

> "One cannot escape the conclusion that the drowning of the decedent was a wholly unnecessary tragedy, and that, with decedent struggling in the water and calling for help and with a half dozen or more employees trying to help him, he could have been saved if adequate life saving equipment had been at hand. * * * The fact that there were life preservers in the crew's sleeping quarters and life rings on a hook on the bridge of one of the barges was not sufficient. They were out of the way and out of sight, twenty or more feet above the deck. They were not thought of in the excitement of the moment, whereas proper equipment on the deck would have been seen and used instead of the inadequate heaving line."

A reasonable construction of the Coast Guard regulation would require life saving equipment to have been at hand in the hazardous boarding area.

3. The court below has rendered a decision in conflict with a decision by another court of appeals in the same matter.

The court below holds: "Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated." (App. B, *infra*, p. 12a)

Muth was admittedly in a helpless condition when he left the tavern. Both courts below have found that this helpless condition was brought about by Muth's excessive drinking of intoxicating liquors and mindful of the "clearly erroneous" rule we must accept this as conclusive.*

Although, this finding may be conclusive, its legal effect is not:

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* Reluctantly, of course, as there was no medical evidence that his helplessness was caused by intoxication; there was evidence that Muth had back trouble aggravated by dampness (App. 69-70), had had a severe fall earlier in the voyage (Supp. App. 13, 59) and had fallen on the sidewalk after leaving the tavern (App. 57-58). The finding is contrary to the nature of the man (App. 63-64, 71) and contrary to the evidence as to his expenditures on the voyage (App. 67). The finding is based upon the testimony of Smith who preceded him to the tavern while he was in the movies and who permitted Muth in his helpless condition to return to the vessel and offered no assistance to Muth or Darr while they were on the walkway. (App. 52). The finding is also based upon the testimony of a waitress whose opinion was based upon what she saw through a restaurant window (App. 40-41) and upon the testimony of the night watchman who saw one of the seamen being held up by another at the dock. (App. 45-46). The finding is even more difficult to accept as to Darr as no one other than the waitress gave any testimony that he was drunk.

In *McDonough* v. *Buckeye Steamship Co.*, 103 F. Supp. 473, 477, Aff. 200 F. 2d 558, the United States Court of Appeals for the Sixth Circuit held that a helplessly drunken seaman, taken from a place of safety to his ship was in the course of his employment and his prior misconduct in becoming helplessly intoxicated was not a proximate cause of his death, there being an intervening agency. The Court rejected the contention "by defendant that the plaintiff is precluded from recovery because of decedent's own misconduct." This holding is in accord with decisions in *Black* v. *New York N.H. & H.R. Co.*, 193 Mass. 448, and *Panor* v. *Northwestern Elevated Ry. Co.*, 228 Ill. App. 162, which recognize that the prior conduct of the helplessly intoxicated person cannot, as a matter of law, be a proximate cause of his injury or death when an intervening agency acts with reference to such condition.

Even without an intervening agency other courts do not go so far as to hold that intoxication is contributory negligence as a matter of law. *Olson, Administratrix* v. *New York Central Railroad* (C.A. 2, 1965) 341 F. 2d 233.

In the *McDonough, Panor* and *Black* decisions the liability of the defendant was founded upon the negligence of the intervening agency which was imputed to the defendant. In this case liability is based upon the employer's failure to provide a safe means of ingress and not necessarily upon the negligence of his agents, but the difference does not alter the fundamental effect of the intervening agency in rendering the prior conduct a remote cause of the injury.

There being a clear-cut conflict between the Sixth and Seventh Circuits on the issue presents a special and important reason for granting the writ.

4. Important questions of federal law which have not been but should be decided by this Court are involved.

The opinion below states, "This perhaps is a pertinent point to make some observation as to the legal effect which the courts have given to the right of seamen to recover under the Jones Act for maintenance and cure or for damages or injuries sustained as are sought in the instant case. *We find no Supreme Court case which has directly decided the point in an action for damages.*" (App. B, *infra*, p. 9a) (Italics ours).

The court below seeking its guidance from maintenance and cure cases in which proximate cause is not of primary consideration holds that the decedent's "gross misconduct" bars recovery. The court refers to language of this Court in *Farrell* v. *United States et al*, 336 U.S. 511 which, when it reached here, was only a maintenance and cure case. But even the dicta of this Court in that case upon which the Court of Appeals relied refers to employee conduct "at the moment of injury" and indicates that principles of proximate cause in Jones Act cases have not been eroded. If this be the fact it should be made clear by an opinion of this Court.

The subsidiary questions involve important issues deserving the attention of this Court, and as to which the lower courts need guidance.

(A) The Limitation of Liability Act.

(1) This Court said in *American Car and Foundry Company* v. *Brassert*, 289 U.S. 261, 264:

> "The liability thus limited is an imputed liability; it is a liability imputed by law by reason of the ownership of the vessel. For his own fault, neglect, and contract the owner remains liable. *Richardson* v. *Harmon*, 222 U.S. 96, 103-106; *Pendleton* v. *Benner*, 246 U.S. 356.

But in *LaBourgogne,* 210 U.S. 95, 122, this Court had said,

> "Negligence pure and simple, in and of itself, does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute."

These two statements have caused confusion in the lower courts. See *The Virginian* 264 Fed. 986, 996-997, and *Rautbord* v. *Ehmann,* C.A. 7 190 F. 2d 533, 537-538 relied on by respondents for the proposition that "privity and knowledge means more than mere negligence. It requires personal participation of the vessel owner and import actual knowledge causing or contributing to the loss." (Brief of Petitioner-Appellees and Cross-Appellants, p. 39, 61).

The district judge admitted his own confusion, saying "I will tell you, for what it is worth, that the issue of limitations is one on which I think I spent as much or more time, my law clerk and I, on as any, and I am satisfied that an absent shipowner, who, on this record, never saw the conditions at midnight or 2:00 o'clock in the morning, [It was established by respondent's own witness, Atlass' son, that he had been present after dark (App. 49)] who I think could not reasonably be held to have known that there were conditions that were less than adequate for safe ingress and egress, is not *personally* liable." (Emphasis ours)

"Negligence in Jones Act cases (sic)* has to be something more positive, more direct and more proximate in my judgment, than Mr. Atlass in Chicago, at the time when an accident occurs. It is a combination cause of the conditions of the individuals and the conditions of the premises,

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* As the district judge determined that there was Jones Act liability but allowed limitation he obviously was still referring to the Limitation of Liability Act.

of which the record indicates at most he had some knowledge some thirty-six hours earlier or thirty-four hours earlier." (App. 60-61)

(2) Another issue deserving the attention of this Court is whether the requirement of Rule 51 of this Court's Admiralty rules that the petition for limitation of liability shall set forth the facts and circumstances upon which limitation is claimed is met by a petition which failed to allege either a want of privity or knowledge or any facts from which such a want of privity or knowledge can be found.

(B) Pre-Judgment Interest. Pre-judgment interest is not allowed in Jones Act cases on a jury verdict but pre-judgment interest has been allowed in Admiralty cases by the Court sitting without a jury. *Petition of Mid-West Towing Company,* 203 F. Supp. 727, 733, aff'd C.A. 7, 1963, 317 F. 2d 270; *Petition of New York,* C.A. 2, 1964, 332 F. 2d 1006; Cf. *National Airlines* v. *Styles,* C.A. 5, 1959, 268 F.2d 400; *Moore-McCormick Lines, Inc.* v. *Richardson,* C.A. 2, 1961, 295 F.2d 583. See dissent in *Powers* v. *New York Central Railroad Company,* (C.A. 2, 1958), 251 F.2d 813, 818-819. It would be appropriate for this Court to rule whether it is proper to allow pre-judgment interest in a limitation of liability proceeding in admiralty on a Jones Act claim.

CONCLUSION.

For the foregoing reasons a petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A — STATUTES AND REGULATION

1. Statutes

46 U.S.C. §183 (a)

"The liability of the owner of any vessel, * * * for any act, * * * done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." R.S. §4283; Aug. 29, 1935, c. 804, §1, 49 Stat. 960; June 5, 1936, c. 521, §1, 49 Stat. 1474.

46 U.S.C. §187

"Nothing in sections * * * 183 * * * of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers or seamen, for or on account of * * *any negligence * * * of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." R.S. §4248.

46 U.S.C. §688

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office

is located." Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

45 U.S.C. §51

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its * * * boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685 §1, 53 Stat. 1404.

45 U.S.C. §53

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any

statute enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

45 U.S.C. §54

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statutes enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

2. Regulation

46 C.F.R., §25.25-15 (a)

"The life saving equipment on all vessels shall be so placed as to be readily accessible."

APPENDIX B

OPINION OF COURT OF APPEALS

June 30, 1965

Before KILEY, SWYGERT and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This proceeding in Admiralty was initiated by H. Leslie Atlass as the owner of the yacht "Sis," under the Limitation of Liability Act (46 U.S.C.A. Secs. 183-189) and Rules 51-54 of the Rules of Practice in Admiralty and Maritime Cases, for exoneration from or, in the alternative, limitation of liability under the Jones Act (46 U.S.C.A. Sec. 688), for the death by drowning of two seamen, Clem Muth and Kurt Darr. Their representatives appeared as claimants and answered the petition. Subsequently, petitioner died and the executors of his estate were substituted as parties. (In this opinion we shall use the term "petitioner" rather than the names of his substituted parties.)

The District Court, after a lengthy trial without a jury, made extensive findings of fact and entered its conclusions of law. It concluded among other things that Atlass as an employer was liable for the deaths of the two seaman-employees which allegedly were proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. The Court also concluded that Muth and Darr were in part responsible for their deaths by reason of their own negligence. The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr. Based on these conclusions an award of damages was made to the representative of each of claimants' estates.

From the Court's conclusion, embodied in its judgment, that petitioner was entitled to a limitation of liability, claimants appeal. From its conclusion, also embodied

in its judgment, denying exoneration to petitioner, the latter cross-appeals.

While perhaps evident, we think it pertinent to note that if petitioner was entitled to exoneration, the issue as to limitation of liability is of no consequence. As the Court stated in The 84-H, 296 Fed. 427, 431 (C.A. 2):

> "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether the loss or damage was occasioned or incurred without the 'privity or knowledge' of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends."

To the same effect see *Rautbord* v. *Ehmann*, 190 F.2d 533, 537 (C.A. 7).

It appears appropriate in the beginning to make a brief summary of the pleadings. The petition among other things alleged that petitioner was the owner of a certain vessel of the United States known as the yacht "Sis," of the registered dimensions of 101.5 feet in length, 19.2 feet in breadth and 11.1 feet in depth, and of 131 gross and 89 net registered tonnage, with home port at Chicago, Illinois, and that at about 3 a.m. on October 26, 1956, while the "Sis" was within the Admiralty and Maritime jurisdiction of the United States, upon a certain drydock in the harbor at Detroit, Michigan, Clem Muth and Kurt Darr dropped or jumped into open water in a gap between the shipyard dock and the drydock, and drowned, while apparently returning to the yacht after spending the evening and early morning ashore.

The petition alleged that petitioner at all times exercised due diligence to make the vessel seaworthy and

in all respects fit for the uses and purposes for which she was used; that the deaths of the said Muth and Darr were in nowise caused by the fault of the "Sis" or the persons in charge of her, or of petitioner or any other person for whose fault or neglect petitioner might be responsible, but was the direct and immediate result of the fault of Muth and Darr, or the result of inevitable accident. The petition further alleged that Catherine Eleanor Muth as administratrix of the estate of Clem Muth had brought an action in the District Court against petitioner, claiming damages under the Jones Act (46 U.S.C.A. Sec. 688) in the amount of $250,000.00, and that petitioner had reason to believe that the personal representative of Kurt Darr, deceased, would commence an action against petitioner arising out of the same casualty.

The representatives of Muth and Darr (claimants) answered the petition, denying its material allegations. Muth's answer alleged that the death of Clem Muth was the immediate and proximate result of the negligence and careless acts of petitioner, his agents, servants, workmen and employees, occasioned and incurred with the fault, privity and knowledge of petitioner in carelessly permitting certain unsafe and dangerous conditions to prevail, in failing to provide safe and proper equipment on said vessel and in failing to take reasonable precautions to provide safe working conditions. Among the acts of negligence alleged were that petitioner "Negligently failed to provide a reasonably safe place to work, a safe means of ingress to and egress from the vessel, a gangplank or other safe means of leaving or boarding the vessel, adequate and proper illumination or light in the boarding area." (Other acts alleged appear to be embodied in those stated.)

Darr's answer was substantially the same as that of Muth, alleging that his death was caused by the negligence of petitioner, his agents and servants.

We shall first make an abbreviated statement of the facts as found by the District Court. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. Among those aboard were H. Leslie

Atlass, vice president of CBS in charge of its Chicago office, the registered owner of the yacht; Muth and Darr; Frank E. Johnson a purchasing agent employed by CBS; Raymond Mendel, acting first mate, employed by Atlass; Robert L. Smith, engineer of the yacht, employed by Atlass, and John Wasilas, a painter employed by CBS.

On October 22, 1956, after having been stranded in the St. Clair River for two days, the yacht proceeded under her own power to the Detroit Basin, Inc., a shipyard in the Detroit River. On October 23, she was there placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail until after Muth and Darr drowned.

The marine rail was 101′ long and 34′ wide. Along the north (or inshore) end, it was level with the dock and there was a place 10′ wide to walk onto the marine rail bed without stepping across any gap. The yacht faced north in its position on the marine rail. On the eastern edge of the rail bed there were eight stanchions lined in a north-south row 13′ apart. The base of each stanchion was 15″ wide. Between the second and third, and also between the seventh and eighth, stanchions, from the north, there were steel crosspieces, each an inch in diameter, which crossed at a height of 5½′.

Immediately east of the eastern edge of the rail bed was a 32″ gap, below which there was water. At a point opposite the mid-point between the first and second stanchions (from the north) the water was 10 to 15′ deep. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway about 5′ wide which extended north and south for a distance of 65′. The level of this walkway was approximately 2″ below the rail bed. Preparatory to doing repair work on the yacht, scaffolding was erected by the shipyard company on the starboard side and at her bow. While the yacht was on the marine rail, toilet and cooking facilities on board could not be used. Members of the crew slept on the yacht, although Johnson and Darr occasionally stayed on shore in a hotel.

Two means of ingress and egress were available, (1) a ladder between the rail bed and the gangway on the starboard side slightly forward of midship, which necessitated stepping across the gap, and (2) the north end of the rail bed which abutted the dock where there was no gap (inshore route). Abutting the east edge of the walkway was a boat shed, the west wall of which was 24′ high, all glass except for a 4′ concrete base. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row.

While the yacht was on the marine rail or before, Atlass (petitioner) was joined by his son, Atlass, Jr., and his daughter, Harriet. On the morning of October 24, Atlass and members of his family left for Chicago, leaving Johnson in charge. Atlass was not again present at the yacht until after the fatal occurrence.

We now come to the events of the night of October 25, which culminated in the fatalities at about 3 o'clock the following morning. At about 7 p.m. (after dark), Smith, Mendel, Johnson, Wasilas, Muth and Darr went ashore to eat. The group left by the route they had most frequently taken, going from the vessel gangway down the ladder on the marine rail platform and then stepping across the gap to the walkway. This was at a point about 50′ from the north end of the walkway where there was an entrance from the boat shed. The party could have used the inshore route that night, where it was not necessary to cross any water. Everyone, including Muth and Darr, had used the inshore route on previous occasions, both in daylight and dark. Mendel returned to the ship at about 8 p.m., and Wasilas at about 9 p.m.

After dinner, Johnson, Muth and Darr went to a movie, then to a tavern known as Garvin's Bar where they found Smith and took turns ordering rounds of drinks. Muth was drinking straight whiskey with beer chasers. The bar stopped serving drinks at 2 a.m., and shortly thereafter Muth, Darr and Smith left, having been in the tavern three hours. A few minutes later they appeared at the boat shed through which they must pass in returning to the yacht.

Gildersleeve, who had been the night watchman for thirteen years, unlocked the shed, turned on the overhead lights and permitted the three men to pass through. Darr was attempting to hold Muth as they went through the door, three or four steps ahead of Smith. As they emerged on the walkway, Darr was holding Muth up. They could have gone straight ahead and reached the rail bed by the inshore route, but instead they turned left and started down the walkway. About 15′ from the door of the boat shed, Muth fell into the gap between the walkway and the marine rail platform. Darr jumped in right behind him. They both drowned. (There was no proof that Muth was attempting to cross the gap at that unusual point.)

While the degree of intoxication of Muth and Darr at the time of the fatal occurrence is highly important, we need not burden this opinion with a detailed recital of the testimony bearing thereon. The Court found:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into the gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other.

This perhaps is a pertinent point to make some observations as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. We find no Supreme Court case which has directly decided the point in an action for damages. However, *Farrell* v. *United States, et al.*, 336 U.S. 511, throws some light on the issue and it is pertinent because it contrasts the rights of the seaman under the two forms of action which are sometimes confused. In that case, the seaman sought to recover on both theories. The trial court sustained his action for maintenance and cure but dismissed it for damages. The Court of Appeals affirmed, *Farrell* v. *United States, et al.*, 167 F. 2d 781. The Supreme Court, in affirming the Court of Appeals, referred to a previous opinion and stated (page 515):

> "In *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from a seaman's dependence on his ship, not from his individual deserts, and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from *gross misconduct* or insubordination, what the seaman is doing and why and how he sustains injury does not affect his right to maintenance and cure, however *decisive it may be as to claims for indemnity or for damages for negligence.* [Italics supplied.]"

Thus, the Court indicates that gross misconduct, and we think the conduct of Muth and Darr must be so characterized, may be decisive in an action for damages based on negligence.

In *Wiper* v. *Erie Sand Steamship Co.*, 293 F. 2d 491, the Court affirmed the dismissal of a Jones Act case brought on the theory that the shipowner was negligent in permitting the seaman to go ashore when he was in a drunken condition. In rejecting the theory, the Court stated (page 493):

"Whatever the 'parental' duty of a ship's captain may be, it surely does not require him to forcibly detain every crew member who has had a few drinks or who wishes to go ashore to do a bit of drinking for relaxation."

In *Schlichter* v. *Port Arthur Towing Company*, 288 F. 2d 801, in a damage action for the death of a seaman by drowning when he fell overboard, the Court sustained a judgment in favor of the vessel owner. The Court cited cases in support of the general rule that intoxication only mitigates damages but (page 803), "Of course, the result is different if the seaman's negligent intoxication is the sole cause of the injuries."

In *Barlow* v. *Pan Atlantic S.S. Corp., et al.*, 101 F. 2d 697, the Court affirmed a judgment denying the right of a seaman to recover maintenance and cure because of injuries sustained as a result of falling from a ladder while intoxicated.

In *The S.S. Berwindglen, Rawding* v. *Hooten*, 88 F. 2d 125, the Court sustained a judgment denying a claim for maintenance and cure for injuries sustained in attempting while intoxicated to climb a ladder leading to the dock.

Another case to be noted because of its similarity of facts is *Landy* v. *United States, et al.*, 101 F. Supp. 486. The action in Admiralty was brought by decedent's representative to recover damages under the Jones Act for a seaman's death occasioned by injuries sustained when he fell from a ladder while attempting to board a vessel. The owner was charged with negligence in failing to provide a safe means of ingress by reason of the defective condition of the ladder. The Court found that the seaman became intoxicated while ashore and returned to the vessel in that condition. Notwithstanding the Court's finding that the ladder was defective as alleged, it dismissed the claim on the basis that the seaman fell solely because he was intoxicated.

Prior to a consideration of the findings which form the basis for the Court's judgment against Atlass, we refer to

an issue of importance, that is, whether Muth and Darr at the time of their deaths were engaged "in the course of their employment," a prerequisite to the right to maintain an action under the Jones Act. The issue is further in the case because of claimants' contention that Johnson and Smith, with knowledge of the intoxicated condition of Muth and Darr, were negligent in permitting them to return to the yacht and that such negligence was imputable to Atlass.

In *Braen* v. *Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 133, the Court stated:

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders."

Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.

Claimants attempt to meet this problem with the argument that the intoxicated condition of Muth was evident to Atlass' agents Johnson and Smith; that such agents were negligent in permitting his return to the ship; that they were acting within the scope of their employment in so doing and that such negligence was imputable to Atlass. We think this argument is without merit. Pertinent to this point is the Court's finding:

> "Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later

by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages."

In the first place, there is no finding that Johnson had knowledge of the intoxicated condition of the two men. There is testimony that he went to the tavern with Muth and Darr, where they joined Smith and had some drinks. Later, time not disclosed, Johnson left the party and returned to his hotel. Thus, the most that is shown as to Johnson is that he knew they were in a tavern drinking intoxicating liquors. He did not accompany and had nothing to do with the return of Muth and Darr to the ship. On what theory he could be found negligent is not discernible.

Assuming, without a finding, that Smith was negligent in accompanying and permitting Muth and Darr to return to the ship, such negligence could not be imputable to Atlass because Smith's activities, both affirmative and negative, were not within the scope of his employment. Certainly he was without authority and it was no part of his duties to protect drunk men in returning to the ship or to prevent them from so doing.

Claimants cite only one Federal case, *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473, affirmed 200 F. 2d 558 (C.A. 6), in support of their theory that Atlass is liable because of the negligence of his agents in taking Muth and Darr to the ship, a place of asserted danger. A comparison of the facts of that case with those here demonstrates that it is of no benefit to claimants. There, the ship owner knew that it was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice. In fact, the ship owner employed a guard at the gate who was charged with the duty of refusing admission to seamen returning in an intoxicated condition. The guard placed another employee in charge of the drunken sailor for the purpose of escorting him to the ship. Instead of discharging his responsibility, the other employee, mid-

way on the journey, abandoned the intoxicated sailor, who later was found drowned. The Court under those circumstances properly held, we think, that the ship owner was responsible for the negligence of its employees who were acting under specific directions and thus undoubtedly in the course of their employment.

Any doubt as to the holding in *Buckeye* is dispelled by *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679 (C.A. 2), in which an action for damages under the Jones Act was dismissed. The Court stated (page 681):

> "There [referring to Buckeye] the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

The Second Circuit as late as 1963, in a Jones Act case approved of the decision in *Robinson* and reversed a judgment in favor of the claimant (a seaman). *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225. As to *Robinson* the Court stated (page 228):

> "Although willing to assume that the assisting seaman was negligent and that the plaintiff's decedent was killed while in the course of *his* employment, this court refused to hold the shipowner responsible. Rather, we held in *Robinson* that the particular act

performed negligently, aiding an intoxicated seaman to return to his ship, was not within the scope of the negligent seaman's employment. [Citing cases.]"

Preliminary to a consideration of the findings relating to petitioner's negligence, it is pertinent to observe that there is no finding of negligence on the part of any person except Muth and Darr. As to Atlass, the Court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings."

Taking this finding at its face value, it would appear to exonerate Atlass from all responsibility for the asserted negligent conditions existing at the time of the occurrence. It may be that the Court while finding that Atlass was not personally responsible thought he was liable because of negligence of others imputable to him. If such be the thinking, there was, as noted, no finding that Johnson, left in charge of the ship when Atlass returned to Chicago, was negligent, and there is no finding that any other employee or agent of Atlass was negligent. It seems that if petitioner is to be held liable on an imputable negligence theory, he is entitled to know by whose negligence and of what it consisted.

In considering the findings as they concern the issue of petitioner's negligence, we recognize, without the citation of authority, two well established principles of law, (1) that an employer has a duty to provide seamen in his employment with safe and seaworthy appliances and a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel, and (2) that the burden of proof under the Jones Act to show negligence causally relating to the accident is on the seaman or his representative. Negligence is not presumed but must be affirmatively proved.

The findings as they relate to negligence, other than those already referred to, are:

"No. 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap."

"No. 39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient."

As already noted, there is no finding or conclusion by the Court that the condition portrayed by these findings was due to the fault or negligence of Atlass, Johnson or any other employee; in fact, the Court found that Atlass was not personally responsible. The stanchions and crossbars referred to were a part of the permanent rail bed structure. The shipyard company constructed the scaffolding preparatory to doing repair work on the yacht, and it was also responsible for the ropes and planks on the rail bed.

Assuming, absent a finding, that there was negligence on the part of petitioner's employees in permitting these so-called obstructions on the rail bed (west) side of the gap, they could not have contributed in whole or in part to the tragedy because Muth and Darr were on the walkway on the opposite (east) side of the gap when they fell or jumped into the water.

That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on the walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioner's seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap.

The Court's finding that "the lighting of the walkway, * * * at the time of the drowning was insufficient" is of a conclusory nature, based upon the opinion testimony of claimants' expert witnesses. Petitioner's expert witness expressed his opinion that the illumination on the walk was sufficient for the purpose of its use. These witnesses seemed to be in substantial agreement that the illumination was equal to that furnished to pedestrians on Chicago streets. The proof by witnesses who had personal knowledge of the condition is overwhelming that the illumination was sufficient for normal and ordinary use. No amount of illumination could have saved Muth and Darr from their own folly. That could have been accomplished only by placing a cover over the gap from end to end.

Smith, the only eye witness, testified that the point of the occurrence was about midway between the entrance to the walkway and the ladder, which had been in the same place since the yacht had been on the rail bed. He stated that "the lighting was good enough you could see to get around in out there because it was shining right through the glass on the platform out here and the walkway"; that he had been with Muth and Darr on previous occasions when they were crossing the gap between the walkway and the rail bed, and that they had no difficulty in seeing. Milton Pinkstaff testified that he had been employed by the shipyard as a carpenter for some fourteen years, that the rail bed had remained in the same position during that time and that the gap was easy to step across. He arrived at the scene of the occurrence at about 3 a.m., and stated that there were no hoses, ropes or debris on the walkway, that the lights in the boathouse were on and that the lighting conditions were very good. Morton Gildersleeve testified that he had been employed by the Detroit Basin as a night watchman from 1948 to 1961, that when on duty he stepped across the gap two or three times each night and that during his employment no person other than Muth and Darr had fallen into the gap. He observed no debris of any kind on the walkway and stated that the lighting conditions were good. All members of the crew, including Muth and Darr, in daytime and at night, had stepped over the gap many times in leaving and returning to the yacht. Atlass' daughter testified that with her tight skirt and high heeled shoes it was an easy step. Raymond Mendel, a witness for claimants, testified, "There wasn't too much light that did come through them windows. It was like early evening, just between dark and evening, you know dusk." He admitted that flashlights were available on the yacht but were rarely needed. In a pre-trial statement, the witness said, "That was an easy step and I am sure everybody who was on the yacht and who I have mentioned, including Mr. Atlass' daughter, Sis, who was a girl in her teens, stepped across the gap without any trouble. I know that I saw Muth and Darr go onto the platform in both ways I have described."

The Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurence. We think there is no basis for a reasonable inference that it was. The misconduct of claimants' decedents was solely responsible for their unfortunate demise.

In *Jackson* v. *Pittsburgh S. S. Co.*, 131 F.2d 668, the Court affirmed a judgment denying to a seaman a claim for damages under the Jones Act. It was there alleged that the boat owner was negligent in his failure to furnish a ladder or any other means of ingress and egress. The seaman desired to go ashore, jumped from the deck of the vessel to the dock, a distance of about six feet and sustained the injuries complained of. The Court assumed that the owner was negligent in failing to provide a ladder but denied recovery because the misconduct of the seaman was the sole cause of his injuries. In doing so the Court stated (page 670):

> "When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. [Citing cases.]"

See also *Meintsma* v. *United States*, 164 F.2d 976, 977.

In conclusion, it seems in order to make a brief statement of the undisputed facts relative to the conduct of Muth and Darr after they were in the water. Smith who was unable to swim stepped to the gap, knelt down and directed his flashlight therein. He saw Darr trying to help Muth, but Muth was throwing his arms around and fighting Darr. Smith lay on the walkway with his left hand down into the gap about three or four feet. He braced himself with his right hand on the rail platform. Smith

shouted several times for them to grab hold of his hand, and if either had reached up he could have done so, but neither did. Gildersleeve, the night watchman was at the scene in a few minutes and saw Smith dangling a rope, trying to get Muth to grab it, holding it right in front of Muth's face between his outstretched arms. The rope actually came in contact with Muth's head and body but he did not take hold of it. Gildersleeve placed a ladder in the water but Muth would not take hold.

Mendel and Wasilas were asleep on the boat when they heard cries for help. Both came to the platform and jumped into the water in an effort to save Muth and Darr. At that time the latter had disappeared. They tied a tight line around Muth's body and gave the end of it to Smith. They then swam underneath the dock into the boat shed and climbed out of the water. Smith held Muth out of the water until their return. When they attempted to pull him from the water, he slipped through the loop and was not seen again.

Muth and Darr were middle-aged men, healthy and vigorous, and both were swimmers. The conclusion is inescapable that their total inability to aid themselves or each other after they were in the water was the result of their intoxicated condition, induced by their own voluntary acts. In contrast, Mendel and Wasilas, who were sober, were in the water for some ten minutes and had no difficulty in swimming to safety.

In our judgment, and we so hold, the deaths of Muth and Darr were the result solely of their own gross misconduct. It follows that the Court erred in its refusal to exonerate Atlass of all liability for loss or damage occasioned thereby. In view of this conclusion, other issues discussed in the briefs need not be considered.

The judgment is reversed and the cause remanded for such further proceedings as are not inconsistent with this holding.

SUPREME COURT, U. S.

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FILED
NOV 10 1965
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No. 733

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioner,

vs.

HARRIET M. ATLASS AND CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

	PAGE
Petition	1
Reference to Reports of Opinions	2
Trial Court findings of fact and Conclusions of Law	18a
Statement of Jurisdictional Grounds	2
Questions presented for Review	2
Statutory Provisions and Regulations Involved	3 and 29a
Statement of the Case	3
Raising the federal Questions	6
Proceedings in Federal Courts	6
Reasons for Granting Writ of Certiorari	9
Opinion and Judgment of Court below	1a
Conclusion	14

List of Authorities.

Butler v. Whiteman, 356 U.S. 271	11
C. & O. Railway Co. v. Newman, 243 F 2d 804	11
Carney v. Pittsburgh, et al. RR, 316 F 2d 277	11
Cox v. Roth, 348 U.S. 207	10
Gardner v. Nat. Bulk Carrier, Inc., 310 F 2d 284	12
Harris v. Penn RR, 50 F 2d 866	12-13
Johnson v. Griffith SS Co., 150 F 2d 224	12
Kirincich v. Standard, et al., 112 F 2d 163	12
Lawlor v. Socony Vacuum Oil Co., 275 F 2d 599	12
Mahnich v. Southern SS Co., 321 U.S. 96	11

PAGE

Marceau v. Great Lakes, et al., 146 F 2d 416 11

McAllister v. U. S., 348 U.S. 19, 75 Sup. Ct. 447 10

McDonough v. Buckeye SS Co., 202 F 2d 588 11

Miner et al. v. Atlass, 363 U.S. 641 8

Olson et al v. New York Central, 341 F 2d 233 (341) 11

Powers v. New York Central RR Co., 251 F 2d 813 12

Sadler v. Penn RR Co., 159 F 2d 784 12

Sanford v. Caswell, 200 F 2d 830 12

Schulz v. Penn RR Co., 350 U.S. 523 11

Socony Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 Sup. Ct. 262 10

STATUTES.

28 U.S.C. § 1254 (1) 2

46 U.S.C. § 688 .....3 and 29a

46 U.S.C. § 183-187 .....3 and 29a

45 U.S.C. § 51-60 .....3, 30a & 31a

REGULATION.

46 C.F.R. § 25.25-15 (a) .....3 and 31a

IN THE

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mollie Darr, Administratrix of the Estate of Kurt Darr, Deceased, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that court

in reversing the trial judge's findings of fact and conclusions of law and ordering the trial judge to enter an order completely exonerating the original petitioner-owner-employer and operator of the vessel involved from all liability in an occurrence wherein two seamen employees of said employer vessel owner lost their lives by drowning while in his employ on October 26, 1956, at Detroit, Michigan, an intermediary port.

A.

Reference to Reports of Opinions:

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in full in Appendix 1A. The findings of fact and the conclusions of law of the trial court are reported in full in Appendix 1B.

(Appendix 1A is reported as 350 F.2d 592.)

B.

STATEMENT OF JURISDICTIONAL GROUNDS.

The decision of the Court of Appeals for the Seventh Circuit was rendered on June 30, 1965. On July 9, 1965, said Court (CA-7) extended the time for filing a petition for rehearing to July 30, 1965, which was timely filed, and subsequently denied on September 28, 1965, by said Court. Jurisdiction of this Court is invoked pursuant to Title 28 U. S. C. Sec. 1254 (1).

C.

QUESTIONS PRESENTED FOR REVIEW.

1. Does voluntary intoxication on the part of a seaman bar his recovery for damages under the Jones Act (46 USCA 688), as a matter of law, in the event of his injury or death?

(a) Is the known propensity of seamen for partaking of alcoholic beverages during shore leave, while at an in-

termediate port, the type of wilful misconduct which exonerates their employer from the otherwise non-delegable duty of providing the crew with safe means of ingress and egress to and from the vessel at night where the crew is quartered?

2. Can a seaman be guilty of contributory negligence or gross misconduct as a matter of law to preclude recovery under the Jones Act (46 USCA 688) or the General Maritime Law, for attempting to rescue a helplessly, intoxicated fellow seaman who, while returning to his vessel by the usual route, and when alongside said vessel, had fallen through a 32 inch gap of water existing between the dock and marine rail, where their vessel was temporarily located?

D.

STATUTES AND REGULATIONS INVOLVED.

46 U.S.C. Sec. 183-187 (Limitation of Liability Act)

46 U.S.C. 688 (Jones Act)

45 U.S.C. Sec. 51-60 (Federal Employee's Liability Act—incorporated by reference in Jones Act)

46 CFR Sec. 25.25-15 (a)

(The pertinent text of the above is set forth in Appendix 1C.)

E.

STATEMENT OF THE CASE.

The pleasure yacht "Sis", while on a voyage on or about October 20, 1956, from Chicago to Florida, ran aground in the St. Clair River opposite Detroit, Michigan. The yacht's owner and operator, H. Leslie Atlass, who was also her registered master, was aboard at said time.

(*Italics throughout ours.*)

The decedents, Kurt Darr and Clem Muth, were also aboard at that time in the capacity of seamen crew members.

After the yacht was freed from its strand, it proceeded under its own power to the Detroit Yacht Basin, Inc. adjoining the Detroit River in Detroit, Michigan, at the owner's direction to be examined for damage, if any.

To expedite the examination of the yacht's hull, she was temporarily placed on a marine rail adjacent to a wood dock with an existing 32 inch gap of open water between the marine rail and dock as well as a 2 inch level variance between said fixtures.

The area in question was also cluttered with scaffolding, hoses, planks, tools, ropes and debris, not uncommon for a ship yard. There was no outdoor lighting designed for or provided in this immediate area. There was no gangplank, gangway or abridgement provided by the owner, employer or anyone else abridging the 32 inch gap of water to provide a safe ingress or egress to and from the yacht for its crew.

While the yacht was on the marine rail, there were no toilet, bathing or cooking facilities and the crew had to seek these necessities elsewhere. Detroit being an intermediate port, the crew remained quartered on the yacht.

H. Leslie Atlass, owner, operator and master of the yacht "Sis" was present on the marine rail platform and dock area off and on for a period of two days and saw the conditions as they existed both in the daytime and at nighttime.

Atlass departed Detroit on the afternoon of October 24, 1956, and ordered the crew to remain intact and placed

it under the charge of Frank E. Johnson, his duly authorized agent, who was quartered separate and apart from the crew at a local hotel.

One of Johnson's functions as the employer-owner's agent in charge, was to take the crew to a land based restaurant for meals, and on October 25, 1956, at approximately dusk and at the employer/owner's expense, Johnson took the crew members for their evening meal to a local shore based restaurant. After the meal, Johnson, Muth, Darr and McKissick, (the yacht's cook), attended a movie, which concluded shortly before midnight. Said group then proceeded to Garvin's Bar where they met the yacht's chief engineer, Robert Smith.

While at Garvin's Bar, Johnson bought the said crew members unknown rounds of drinks and the crew members also purchased a round or so of drinks.

McKissick left before the others, who remained until about 2:00 a.m. (closing time) which was now October 26, 1956. One member of this group, Clem Muth, apparently became helplessly intoxicated, and it became necessary for Smith and Darr to take Muth to the dock area which was a few blocks away. Upon arrival at the dock area, Darr was the only one assisting Muth to stay on his feet when Muth fell into the 32 inch gap of water (dock 7 feet above water—15 feet deep) which existed between the dock and marine rail.

Darr immediately entered the water to save Muth because Smith was unable to swim and failed to give any appreciable or effective help from the dock. There was no life saving or resuscitation equipment on the dock or readily accessible on the yacht.

Muth became hysterical upon entering the water and flayed away wildly, fighting off all the rescue efforts that

Darr was attempting in the ice cold October water. Even though two other crew members arrived after valuable minutes had uselessly gone by, their rescue efforts were of no avail and resulted in the drowning of both Muth and Darr. Actually, no effort was ever made to rescue Darr. Darr left surviving him, his widow and 3 minor children.

F.

THE RAISING OF THE FEDERAL QUESTIONS.

This petition is to review an order issued by the United States Court of Appeals for the Seventh Circuit, reversing the trial court.

G.

PROCEEDING IN FEDERAL COURTS.

The Petition for Limitation of Liability was commenced in the United States District Court for the Northern District of Illinois, on April 22, 1957. Claim of Mollie Darr, Administratrix of the Estate of Kurt Darr, deceased, filed May 23, 1957. Answer of Mollie Darr, Administratrix, filed May 27, 1957.

Claim of Catherine Eleanor Muth, Administratrix of the Estate of Clem Muth, deceased, filed May 28, 1957. Answer of Catherine Eleanor Muth, Administratrix, filed May 28, 1957.

Jones Act case on behalf of Catherine Eleanor Muth, Administratrix of the Estate of Clem Muth, deceased, was filed March 22, 1957.

Jones Act case on behalf of Mollie Darr, Administratrix of the Estate of Kurt Darr, deceased, was filed on October 23, 1959.

Atlass died after filing his limitation and/or exoneration from liability petition and thereafter his personal representatives were substituted.

The above causes were consolidated and heard in admiralty without a jury as the trial judge refused claimants a jury trial.

Trial of the proceedings was had on December 3, 4, 5, 6, 9, 11, 12, 1963, and May 11, 14, 15, 18, and 19, 1964, before the Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, without a jury.

Findings of fact and conclusions of law were entered on June 12, 1964. Judgment order was entered on June 25, 1964.

In brief, pertinent to this Petition, the trial court made the following findings of fact, conclusions of law and entered judgment accordingly as follows:

1. That the yacht "Sis" was a licensed pleasure yacht.

2. That Darr and Muth were seamen crew members aboard the yacht "Sis."

3. That the vessel was in navigation.

4. That the debris and other obstacles on the walkway, dock and marine rail and hazards created by the gap, and difference of levels made the lighting at the time of the drownings insufficient.

5. That ingress to and egress from the yacht on the marine rail could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of amidships.

6. That access to and from the yacht was hazardous, especially at night time.

7. That Muth and Darr were partly responsible for their own deaths. Muth's negligence was a 50% factor and Darr's negligence was a 30% factor.

8. That the value of the vessel was $50,000.00 and that limitation of liability should be applied.

9. That the proven damages on behalf of Clem Muth was $142,054.98 which was reduced 50% on account of contributory negligence, less $12,500.00 received on a covenant not to sue from Columbia Broadcasting System, Inc. That the net judgment to the personal representative of Muth was for 36.84426% of $50,000.00 or $18,422.13.

10. That the proven damages on behalf of Kurt Darr was $161,176.51. This was reduced 30% on account of contributory negligence, less $12,500.00 received on a covenant not to sue from Columbia Broadcasting System, Inc. That the net judgment to the personal representative of Kurt Darr was 63.15574% of $50,000.00 or $31,577.87.

Notice of Appeal was filed on September 18, 1964, by claimant Darr. Original Petitioners' representatives filed a cross-appeal on September 21, 1964. The Court of Appeals (CA-7) rendered its decision on June 30, 1965, and claimant Darr thereafter filed a timely petition for a rehearing which was denied by said Court on September 28, 1965.

This Court granted a Writ of Certiorari on a collateral issue of this case, and the Court's opinion is fully reported in *Miner et al v. Atlass,* 363 U.S. 641.

The Court of Appeals (CA-7) substantially reversed the findings of fact of the trial court, completely reversed the judgment of the trial court, and remanded with directions for the trial judge to enter a judgment completely exonerating the substituted representatives of the original Petitioner, H. Leslie Atlass, former owner, master and operator of the pleasure yacht "Sis", from all personal liability.

In brief, pertinent to this petition, the court below (CA-7) concluded as follows:

1. That Darr was not a seaman at the time of his attempted return to his quarters or when he attempted to rescue Muth, who fell in, while alongside the vessel of his employ.

2. That the petitioner was not negligent because neither he nor his agent had notice of any existing dangerous conditions.

3. That Darr was staggering drunk, and as such was guilty of gross misconduct that decisively overruled his personal representative's claim for damages; that he was totally responsible for his drowning.

4. That the lighting conditions were good in the area at the time where the drownings took place.

5. That Petitioner was entitled to exoneration and not merely limitation of his liability.

6. That Atlass could not be negligent even though his agent in charge of the vessel was with the decedents in a tavern buying them drinks and drinking with them immediately prior to the drownings.

7. That Atlass was not negligent because of the condition of the dock and marine rail and the lack of proper ingress and egress to and from the yacht "Sis".

8. That there was no duty on the part of the owner-employer Atlass, to provide his crew with a gangplank and that any member of the crew could have improvised his own gangplank if he so desired.

9. That there were two ways of ingress and egress and that the decedents failed to use a safe route because they took the route normally used by the crew as provided for them by the owner and their employer, Atlass.

H.

REASONS FOR GRANTING WRIT OF CERTIORARI.

The Jones Act (46 USCA 688) has always been considered as *remedial legislation,* such legislation was intended to be *liberally* construed; *Cox* v. *Roth,* 348 U.S. 207 (1955), and not, as would the court below (CA-7) "* * * frustrate the congressional purpose and protection of seamen who are peculiarly the wards of admiralty." (348 U.S., at 210).

"The *Jones Act* as *welfare legislation* is entitled to a *liberal construction* to accomplish its *beneficient* purposes." (348 U.S., at 209-210)

To allow the decision of the court below (CA-7) to remain in its present form would only give the judiciary a license to further erode the Jones Act and thus destroy the congressional purpose and intention for passing said Act.

The court below (CA-7) concluded that seaman Darr's dependent survivors were precluded from recovering damages because his intoxication as a matter of law, was such contributory negligence that in effect completely wiped out the *employer's negligence* contrary to this Court's previous ruling in *Socony Vacuum Oil Co.* v. *Smith* (305 U.S. 424, 59 S Ct. 262) wherein it was held that contributory negligence was no defense to liability in Jones Act and admiralty cases, merely an element to be considered in *mitigation* of *damages.*

The court below (CA-7) in assuming the role of a *Nisi Prius* Court ignored the standards for review in reversing the District Court (sitting in admiralty without a jury) because it failed to show that the findings of the District Court were *clearly erroneous* as set forth by this Court in *McAllister* v. *U.S.* (348 U.S. 19, 75 Sup Ct. 447).

The decision, which is the subject of the Petition for Writ of Certiorari, involves the following conflicts, interpretations and rulings:

1. This decision conflicts with other decisions of other courts of appeal in regard to the same legal doctrines.

A. This decision conflicts with the following decisions which hold that voluntary intoxication does not bar recovery as a matter of law under the General Maritime Law or the Jones Act:

McDonough v. Buckeye SS Co., 200 F 2d 588 (CA 6, 1952) Cert Denied 345 US 926.
Olson, as Admx. v. *New York Central*, 341 F 2d 233 (CA 2nd, 1965).

B. The court below decided a federal question which conflicts with the opinions in the following cases which hold that an employer of seamen owes a non-delegable duty of providing his employees with:

1) a safe place of employment.

2) a safe area for shelter.

3) a safe means of ingress and egress to and from the vessel of employ.

4) safe appliances for work purposes.

Butler v. Whiteman, 356 U. S. 271.
Mahnich v. Southern S.S. Co., 321 U.S. 96.
Schulz v. Penn. R.R. Co., 350 U.S. 523.
C & O Railway Co. v. Newman, 243 F 2d 804.
Carney v. Pittsburgh & Lake Erie RR, 316 F 2d 277.
Marceau v. Great Lakes Transit Corp., 146 F 2d 416.

Sanford v. Caswell, 200 F 2d 830.
Johnson v. Griffith SS Co., 150 F 2d 224.
Lawlor v. Socony Vacuum Oil Co., et al, 275 F 2d 599.

C. This decision conflicts with the following decisions holding that the employer of a decedent seaman is liable for failing to provide and make accessible proper rescue and resuscitation equipment or to use all available means to prevent the seaman in question from drowning:

Gardner v. National Bulk Carrier, Inc., 310 F 2d 284.
Harris v. Penn. RR, 50 F 2nd 866.
Kirincich v. Standard Dredging Co., 112 F 2d 163.
Powers v. NY Central RR Co., 251 F 2d 813.
Sadler v. Penn RR Co., 159 F 2d 784.

2. This decision creates nonuniformity in its interpretation of the following federal statute:

41 Stat. 1007, 46 U.S.C.A. Sec. 688 (Jones Act).

The Court below (CA-7), in search of a plausible reason for reversing the trial court, at least partially based its action for lack of a *Supreme Court precedent:* "This perhaps is a pertinent point to make some observation as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. *We find no Supreme Court case which has directly decided the point in an action for damages."* (Reference to CA-7 #14872-73 page 7 of Appendix 1A).

In conclusion, seaman Darr, while in the prime of his life, a good husband and father of 3 minor children, needlessly lost his life attempting to rescue a helplessly intoxicated crew member who had fallen into the water alongside his employers vessel.

The causative factors linking the seaman's employer to the tragedy were:

1. Lack of safe access to the vessel.
2. Lack of adequate lighting at night time.
3. Lack of gangplank or abridgement from dock to marine rail ladder.
4. No rescue or resuscitation equipment available in the area of tragedy.

It is quite obvious that a drowning man cannot be saved unless someone takes prompt action to try to save him.

Therefore, taking the above factors into consideration, can a seaman be regarded as being guilty of *gross negligence* for attempting the humanitarian act of rescue to save the life of a drowning fellow seaman?

The Court of Appeals (CA-4) in *Harris* v. *Pa. RR*, 50 F 2nd 866 at 868 and 869, quite aptly stated the ships obligation in regard to a drowning seaman:

> "• • • Equally clear is the obligation upon the part of a ship to save the life of a sailor who falls overboard through a misadventure, not uncommon in his dangerous calling. It is absurd to admit the duty to extend aid in the lesser emergency (maintenance and cure for the sick and injured), and to deny it in the greater. In both cases, it is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea

demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right."

CONCLUSION

For the foregoing reasons we urge this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to the end that the order of that Court may be reviewed.

Respectfully Submitted,

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APPENDIX 1A.

OPINION OF COURT OF APPEALS

June 30, 1965

Before KILEY, SWYGERT and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This proceeding in Admiralty was initiated by H. Leslie Atlass as the owner of the yacht "Sis," under the Limitation of Liability Act (46 U.S.C.A. Secs. 183-189) and Rules 51-54 of the Rules of Practice in Admiralty and Maritime Cases, for exoneration from or, in the alternative, limitation of liability under the Jones Act (46 U.S.C.A. Sec. 688), for the death by drowning of two seamen, Clem Muth and Kurt Darr. Their representatives appeared as claimants and answered the petition. Subsequently, petitioner died and the executors of his estate were substituted as parties. (In this opinion we shall use the term "petitioner" rather than the names of his substituted parties.)

The District Court, after a lengthy trial without a jury, made extensive findings of fact and entered its conclusions of law. It concluded among other things that Atlass as an employer was liable for the deaths of the two seaman-employees which allegedly were proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. The Court also concluded that Muth and Darr were in part responsible for their deaths by reason of their own negligence. The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr. Based on these conclusions an award of damages was made to the representative of each of claimants' estates.

From the Court's conclusion, embodied in its judgment, that petitioner was entitled to a limitation of liability, claimants appeal. From its conclusion, also embodied

in its judgment, denying exoneration to petitioner, the latter cross-appeals.

While perhaps evident, we think it pertinent to note that if petitioner was entitled to exoneration, the issue as to limitation of liability is of no consequence. As the Court stated in The 84-H, 296 Fed. 427, 431 (C.A. 2):

> "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether the loss or damage was occasioned or incurred without the 'privity or knowledge' of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends."

To the same effect see *Rautbord* v. *Ehmann*, 190 F.2d 533, 537 (C.A. 7).

It appears appropriate in the beginning to make a brief summary of the pleadings. The petition among other things alleged that petitioner was the owner of a certain vessel of the United States known as the yacht "Sis," of the registered dimensions of 101.5 feet in length, 19.2 feet in breadth and 11.1 feet in depth, and of 131 gross and 89 net registered tonnage, with home port at Chicago, Illinois, and that at about 3 a.m. on October 26, 1956, while the "Sis" was within the Admiralty and Maritime jurisdiction of the United States, upon a certain drydock in the harbor at Detroit, Michigan, Clem Muth and Kurt Darr dropped or jumped into open water in a gap between the shipyard dock and the drydock, and drowned, while apparently returning to the yacht after spending the evening and early morning ashore.

The petition alleged that petitioner at all times exercised due diligence to make the vessel seaworthy and

in all respects fit for the uses and purposes for which she was used; that the deaths of the said Muth and Darr were in nowise caused by the fault of the "Sis" or the persons in charge of her, or of petitioner or any other person for whose fault or neglect petitioner might be responsible, but was the direct and immediate result of the fault of Muth and Darr, or the result of inevitable accident. The petition further alleged that Catherine Eleanor Muth as administratrix of the estate of Clem Muth had brought an action in the District Court against petitioner, claiming damages under the Jones Act (46 U.S.C.A. Sec. 688) in the amount of $250,000.00, and that petitioner had reason to believe that the personal representative of Kurt Darr, deceased, would commence an action against petitioner arising out of the same casualty.

The representatives of Muth and Darr (claimants) answered the petition, denying its material allegations. Muth's answer alleged that the death of Clem Muth was the immediate and proximate result of the negligence and careless acts of petitioner, his agents, servants, workmen and employees, occasioned and incurred with the fault, privity and knowledge of petitioner in carelessly permitting certain unsafe and dangerous conditions to prevail, in failing to provide safe and proper equipment on said vessel and in failing to take reasonable precautions to provide safe working conditions. Among the acts of negligence alleged were that petitioner "Negligently failed to provide a reasonably safe place to work, a safe means of ingress to and egress from the vessel, a gangplank or other safe means of leaving or boarding the vessel, adequate and proper illumination or light in the boarding area." (Other acts alleged appear to be embodied in those stated.)

Darr's answer was substantially the same as that of Muth, alleging that his death was caused by the negligence of petitioner, his agents and servants.

We shall first make an abbreviated statement of the facts as found by the District Court. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. Among those aboard were H. Leslie

Atlass, vice president of CBS in charge of its Chicago office, the registered owner of the yacht; Muth and Darr; Frank E. Johnson a purchasing agent employed by CBS; Raymond Mendel, acting first mate, employed by Atlass; Robert L. Smith, engineer of the yacht, employed by Atlass, and John Wasilas, a painter employed by CBS.

On October 22, 1956, after having been stranded in the St. Clair River for two days, the yacht proceeded under her own power to the Detroit Basin, Inc., a shipyard in the Detroit River. On October 23, she was there placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail until after Muth and Darr drowned.

The marine rail was 101′ long and 34′ wide. Along the north (or inshore) end, it was level with the dock and there was a place 10′ wide to walk onto the marine rail bed without stepping across any gap. The yacht faced north in its position on the marine rail. On the eastern edge of the rail bed there were eight stanchions lined in a north-south row 13′ apart. The base of each stanchion was 15″ wide. Between the second and third, and also between the seventh and eighth, stanchions, from the north, there were steel crosspieces, each an inch in diameter, which crossed at a height of 5½′.

Immediately east of the eastern edge of the rail bed was a 32″ gap, below which there was water. At a point opposite the mid-point between the first and second stanchions (from the north) the water was 10 to 15′ deep. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway about 5′ wide which extended north and south for a distance of 65′. The level of this walkway was approximately 2″ below the rail bed. Preparatory to doing repair work on the yacht, scaffolding was erected by the shipyard company on the starboard side and at her bow. While the yacht was on the marine rail, toilet and cooking facilities on board could not be used. Members of the crew slept on the yacht, although Johnson and Darr occasionally stayed on shore in a hotel.

Two means of ingress and egress were available, (1) a ladder between the rail bed and the gangway on the starboard side slightly forward of midship, which necessitated stepping across the gap, and (2) the north end of the rail bed which abutted the dock where there was no gap (inshore route). Abutting the east edge of the walkway was a boat shed, the west wall of which was 24′ high, all glass except for a 4′ concrete base. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row.

While the yacht was on the marine rail or before, Atlass (petitioner) was joined by his son, Atlass, Jr., and his daughter, Harriet. On the morning of October 24, Atlass and members of his family left for Chicago, leaving Johnson in charge. Atlass was not again present at the yacht until after the fatal occurrence.

We now come to the events of the night of October 25, which culminated in the fatalities at about 3 o'clock the following morning. At about 7 p.m. (after dark), Smith, Mendel, Johnson, Wasilas, Muth and Darr went ashore to eat. The group left by the route they had most frequently taken, going from the vessel gangway down the ladder on the marine rail platform and then stepping across the gap to the walkway. This was at a point about 50′ from the north end of the walkway where there was an entrance from the boat shed. The party could have used the inshore route that night, where it was not necessary to cross any water. Everyone, including Muth and Darr, had used the inshore route on previous occasions, both in daylight and dark. Mendel returned to the ship at about 8 p.m., and Wasilas at about 9 p.m.

After dinner, Johnson, Muth and Darr went to a movie, then to a tavern known as Garvin's Bar where they found Smith and took turns ordering rounds of drinks. Muth was drinking straight whiskey with beer chasers. The bar stopped serving drinks at 2 a.m., and shortly thereafter Muth, Darr and Smith left, having been in the tavern three hours. A few minutes later they appeared at the boat shed through which they must pass in returning to the yacht.

Gildersleeve, who had been the night watchman for thirteen years, unlocked the shed, turned on the overhead lights and permitted the three men to pass through. Darr was attempting to hold Muth as they went through the door, three or four steps ahead of Smith. As they emerged on the walkway, Darr was holding Muth up. They could have gone straight ahead and reached the rail bed by the inshore route, but instead they turned left and started down the walkway. About 15′ from the door of the boat shed, Muth fell into the gap between the walkway and the marine rail platform. Darr jumped in right behind him. They both drowned. (There was no proof that Muth was attempting to cross the gap at that unusual point.)

While the degree of intoxication of Muth and Darr at the time of the fatal occurrence is highly important, we need not burden this opinion with a detailed recital of the testimony bearing thereon. The Court found:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into the gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other.

This perhaps is a pertinent point to make some observations as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. We find no Supreme Court case which has directly decided the point in an action for damages. However, *Farrell* v. *United States, et al.*, 336 U.S. 511, throws some light on the issue and it is pertinent because it contrasts the rights of the seaman under the two forms of action which are sometimes confused. In that case, the seaman sought to recover on both theories. The trial court sustained his action for maintenance and cure but dismissed it for damages. The Court of Appeals affirmed, *Farrell* v. *United States, et al.*, 167 F. 2d 781. The Supreme Court, in affirming the Court of Appeals, referred to a previous opinion and stated (page 515):

> "In *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from a seaman's dependence on his ship, not from his individual deserts, and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from *gross misconduct* or insubordination, what the seaman is doing and why and how he sustains injury does not affect his right to maintenance and cure, however *decisive it may be as to claims for indemnity or for damages for negligence.* [Italics supplied.]"

Thus, the Court indicates that gross misconduct, and we think the conduct of Muth and Darr must be so characterized, may be decisive in an action for damages based on negligence.

In *Wiper* v. *Erie Sand Steamship Co.*, 293 F. 2d 491, the Court affirmed the dismissal of a Jones Act case brought on the theory that the shipowner was negligent in permitting the seaman to go ashore when he was in a drunken condition. In rejecting the theory, the Court stated (page 493):

"Whatever the 'parental' duty of a ship's captain may be, it surely does not require him to forcibly detain every crew member who has had a few drinks or who wishes to go ashore to do a bit of drinking for relaxation."

In *Schlichter* v. *Port Arthur Towing Company,* 288 F. 2d 801, in a damage action for the death of a seaman by drowning when he fell overboard, the Court sustained a judgment in favor of the vessel owner. The Court cited cases in support of the general rule that intoxication only mitigates damages but (page 803), "Of course, the result is different if the seaman's negligent intoxication is the sole cause of the injuries."

In *Barlow* v. *Pan Atlantic S.S. Corp., et al.,* 101 F. 2d 697, the Court affirmed a judgment denying the right of a seaman to recover maintenance and cure because of injuries sustained as a result of falling from a ladder while intoxicated.

In *The S.S. Berwindglen, Rawding* v. *Hooten,* 88 F. 2d 125, the Court sustained a judgment denying a claim for maintenance and cure for injuries sustained in attempting while intoxicated to climb a ladder leading to the dock.

Another case to be noted because of its similarity of facts is *Landy* v. *United States, et al.,* 101 F. Supp. 486. The action in Admiralty was brought by decedent's representative to recover damages under the Jones Act for a seaman's death occasioned by injuries sustained when he fell from a ladder while attempting to board a vessel. The owner was charged with negligence in failing to provide a safe means of ingress by reason of the defective condition of the ladder. The Court found that the seaman became intoxicated while ashore and returned to the vessel in that condition. Notwithstanding the Court's finding that the ladder was defective as alleged, it dismissed the claim on the basis that the seaman fell solely because he was intoxicated.

Prior to a consideration of the findings which form the basis for the Court's judgment against Atlass, we refer to

an issue of importance, that is, whether Muth and Darr at the time of their deaths were engaged "in the course of their employment," a prerequisite to the right to maintain an action under the Jones Act. The issue is further in the case because of claimants' contention that Johnson and Smith, with knowledge of the intoxicated condition of Muth and Darr, were negligent in permitting them to return to the yacht and that such negligence was imputable to Atlass.

In *Braen* v. *Pfeifer Oil Transportation Co., Inc.,* 361 U.S. 129, 133, the Court stated:

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders."

Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.

Claimants attempt to meet this problem with the argument that the intoxicated condition of Muth was evident to Atlass' agents Johnson and Smith; that such agents were negligent in permitting his return to the ship; that they were acting within the scope of their employment in so doing and that such negligence was imputable to Atlass. We think this argument is without merit. Pertinent to this point is the Court's finding:

> "Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later

by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages."

In the first place, there is no finding that Johnson had knowledge of the intoxicated condition of the two men. There is testimony that he went to the tavern with Muth and Darr, where they joined Smith and had some drinks. Later, time not disclosed, Johnson left the party and returned to his hotel. Thus, the most that is shown as to Johnson is that he knew they were in a tavern drinking intoxicating liquors. He did not accompany and had nothing to do with the return of Muth and Darr to the ship. On what theory he could be found negligent is not discernible.

Assuming, without a finding, that Smith was negligent in accompanying and permitting Muth and Darr to return to the ship, such negligence could not be imputable to Atlass because Smith's activities, both affirmative and negative, were not within the scope of his employment. Certainly he was without authority and it was no part of his duties to protect drunk men in returning to the ship or to prevent them from so doing.

Claimants cite only one Federal case, *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473, affirmed 200 F. 2d 558 (C.A. 6), in support of their theory that Atlass is liable because of the negligence of his agents in taking Muth and Darr to the ship, a place of asserted danger. A comparison of the facts of that case with those here demonstrates that it is of no benefit to claimants. There, the ship owner knew that it was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice. In fact, the ship owner employed a guard at the gate who was charged with the duty of refusing admission to seamen returning in an intoxicated condition. The guard placed another employee in charge of the drunken sailor for the purpose of escorting him to the ship. Instead of discharging his responsibility, the other employee, mid-

way on the journey, abandoned the intoxicated sailor, who later was found drowned. The Court under those circumstances properly held, we think, that the ship owner was responsible for the negligence of its employees who were acting under specific directions and thus undoubtedly in the course of their employment.

Any doubt as to the holding in *Buckeye* is dispelled by *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679 (C.A. 2), in which an action for damages under the Jones Act was dismissed. The Court stated (page 681):

> "There [referring to Buckeye] the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

The Second Circuit as late as 1963, in a Jones Act case approved of the decision in *Robinson* and reversed a judgment in favor of the claimant (a seaman). *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225. As to *Robinson* the Court stated (page 228):

> "Although willing to assume that the assisting seaman was negligent and that the plaintiff's decedent was killed while in the course of *his* employment, this court refused to hold the shipowner responsible. Rather, we held in *Robinson* that the particular act

performed negligently, aiding an intoxicated seaman to return to his ship, was not within the scope of the negligent seaman's employment. [Citing cases.]"

Preliminary to a consideration of the findings relating to petitioner's negligence, it is pertinent to observe that there is no finding of negligence on the part of any person except Muth and Darr. As to Atlass, the Court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings."

Taking this finding at its face value, it would appear to exonerate Atlass from all responsibility for the asserted negligent conditions existing at the time of the occurrence. It may be that the Court while finding that Atlass was not personally responsible thought he was liable because of negligence of others imputable to him. If such be the thinking, there was, as noted, no finding that Johnson, left in charge of the ship when Atlass returned to Chicago, was negligent, and there is no finding that any other employee or agent of Atlass was negligent. It seems that if petitioner is to be held liable on an imputable negligence theory, he is entitled to know by whose negligence and of what it consisted.

In considering the findings as they concern the issue of petitioner's negligence, we recognize, without the citation of authority, two well established principles of law, (1) that an employer has a duty to provide seamen in his employment with safe and seaworthy appliances and a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel, and (2) that the burden of proof under the Jones Act to show negligence causally relating to the accident is on the seaman or his representative. Negligence is not presumed but must be affirmatively proved.

The findings as they relate to negligence, other than those already referred to, are:

"No. 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap."

"No. 39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient."

As already noted, there is no finding or conclusion by the Court that the condition portrayed by these findings was due to the fault or negligence of Atlass, Johnson or any other employee; in fact, the Court found that Atlass was not personally responsible. The stanchions and crossbars referred to were a part of the permanent rail bed structure. The shipyard company constructed the scaffolding preparatory to doing repair work on the yacht, and it was also responsible for the ropes and planks on the rail bed.

Assuming, absent a finding, that there was negligence on the part of petitioner's employees in permitting these so-called obstructions on the rail bed (west) side of the gap, they could not have contributed in whole or in part to the tragedy because Muth and Darr were on the walkway on the opposite (east) side of the gap when they fell or jumped into the water.

That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on the walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioner's seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap.

The Court's finding that "the lighting of the walkway, * * * at the time of the drowning was insufficient" is of a conclusory nature, based upon the opinion testimony of claimants' expert witnesses. Petitioner's expert witness expressed his opinion that the illumination on the walk was sufficient for the purpose of its use. These witnesses seemed to be in substantial agreement that the illumination was equal to that furnished to pedestrians on Chicago streets. The proof by witnesses who had personal knowledge of the condition is overwhelming that the illumination was sufficient for normal and ordinary use. No amount of illumination could have saved Muth and Darr from their own folly. That could have been accomplished only by placing a cover over the gap from end to end.

Smith, the only eye witness, testified that the point of the occurrence was about midway between the entrance to the walkway and the ladder, which had been in the same place since the yacht had been on the rail bed. He stated that "the lighting was good enough you could see to get around in out there because it was shining right through the glass on the platform out here and the walkway"; that he had been with Muth and Darr on previous occasions when they were crossing the gap between the walkway and the rail bed, and that they had no difficulty in seeing. Milton Pinkstaff testified that he had been employed by the shipyard as a carpenter for some fourteen years, that the rail bed had remained in the same position during that time and that the gap was easy to step across. He arrived at the scene of the occurrence at about 3 a.m., and stated that there were no hoses, ropes or debris on the walkway, that the lights in the boathouse were on and that the lighting conditions were very good. Morton Gildersleeve testified that he had been employed by the Detroit Basin as a night watchman from 1948 to 1961, that when on duty he stepped across the gap two or three times each night and that during his employment no person other than Muth and Darr had fallen into the gap. He observed no debris of any kind on the walkway and stated that the lighting conditions were good. All members of the crew, including Muth and Darr, in daytime and at night, had stepped over the gap many times in leaving and returning to the yacht. Atlass' daughter testified that with her tight skirt and high heeled shoes it was an easy step. Raymond Mendel, a witness for claimants, testified, "There wasn't too much light that did come through them windows. It was like early evening, just between dark and evening, you know dusk." He admitted that flashlights were available on the yacht but were rarely needed. In a pre-trial statement, the witness said, "That was an easy step and I am sure everybody who was on the yacht and who I have mentioned, including Mr. Atlass' daughter, Sis, who was a girl in her teens, stepped across the gap without any trouble. I know that I saw Muth and Darr go onto the platform in both ways I have described."

The Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurence. We think there is no basis for a reasonable inference that it was. The misconduct of claimants' decedents was solely responsible for their unfortunate demise.

In *Jackson* v. *Pittsburgh S. S. Co.*, 131 F.2d 668, the Court affirmed a judgment denying to a seaman a claim for damages under the Jones Act. It was there alleged that the boat owner was negligent in his failure to furnish a ladder or any other means of ingress and egress. The seaman desired to go ashore, jumped from the deck of the vessel to the dock, a distance of about six feet and sustained the injuries complained of. The Court assumed that the owner was negligent in failing to provide a ladder but denied recovery because the misconduct of the seaman was the sole cause of his injuries. In doing so the Court stated (page 670):

> "When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. [Citing cases.]"

See also *Meintsma* v. *United States*, 164 F.2d 976, 977.

In conclusion, it seems in order to make a brief statement of the undisputed facts relative to the conduct of Muth and Darr after they were in the water. Smith who was unable to swim stepped to the gap, knelt down and directed his flashlight therein. He saw Darr trying to help Muth, but Muth was throwing his arms around and fighting Darr. Smith lay on the walkway with his left hand down into the gap about three or four feet. He braced himself with his right hand on the rail platform. Smith

shouted several times for them to grab hold of his hand, and if either had reached up he could have done so, but neither did. Gildersleeve, the night watchman was at the scene in a few minutes and saw Smith dangling a rope, trying to get Muth to grab it, holding it right in front of Muth's face between his outstretched arms. The rope actually came in contact with Muth's head and body but he did not take hold of it. Gildersleeve placed a ladder in the water but Muth would not take hold.

Mendel and Wasilas were asleep on the boat when they heard cries for help. Both came to the platform and jumped into the water in an effort to save Muth and Darr. At that time the latter had disappeared. They tied a tight line around Muth's body and gave the end of it to Smith. They then swam underneath the dock into the boat shed and climbed out of the water. Smith held Muth out of the water until their return. When they attempted to pull him from the water, he slipped through the loop and was not seen again.

Muth and Darr were middle-aged men, healthy and vigorous, and both were swimmers. The conclusion is inescapable that their total inability to aid themselves or each other after they were in the water was the result of their intoxicated condition, induced by their own voluntary acts. In contrast, Mendel and Wasilas, who were sober, were in the water for some ten minutes and had no difficulty in swimming to safety.

In our judgment, and we so hold, the deaths of Muth and Darr were the result solely of their own gross misconduct. It follows that the Court erred in its refusal to exonerate Atlass of all liability for loss or damage occasioned thereby. In view of this conclusion, other issues discussed in the briefs need not be considered.

The judgment is reversed and the cause remanded for such further proceedings as are not inconsistent with this holding.

wheelhouse and painted the top deck. An additional two coats of paint were to be applied to the hull when the yacht docked in Florida.

11. On the day that the "Sis" was to sail for Florida, Johnson, on Atlass' behalf, told Muth, Darr and Wasilas that extra deck hands were needed for the voyage, and he asked them to come along to work. They agreed to do so.

12. As the trip commenced, Muth, Darr and Wasilas assisted with the folding of the lines. Shortly thereafter, Muth, Darr and Mendel were instructed by Atlass (or, on his behalf, by Johnson) to install a watertight manhole cover near the yacht's bow. They attempted unsuccessfully to do so while the "Sis" was heading into a strong wind and high waves; later the vessel was turned and slowed, and the job was completed.

13. The following afternoon, Muth, Darr, Wasilas and Mendel cleaned, mopped and straightened up the deck.

14. At various times during the voyage, Muth, Darr and Wasilas kept watch. In addition, Darr steered some of the time.

15. On October 20, the yacht stranded in the St. Clair River. Everyone aboard, including Muth and Darr, assisted in efforts to dislodge her. She finally was freed on October 22 and proceeded under her own power to the Detroit Basin, Inc., on the Detroit River.

16. On October 23, the yacht was placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail from that time until after Muth and Darr drowned.

17. While she was on the marine rail, ingress to and egress from the yacht could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of midships.

18. While the "Sis" was on the marine rail, toilet and cooking facilities on board could not be used. The crew continued, nevertheless, to sleep on board. Muth, Mendel, Smith and Wasilas, among others, slept in the crew's quarters as they had each night after the vessel left Chicago. Johnson, who with Darr had been sleeping in the officers' quarters, stayed in a hotel after October 23; Darr slept in a hotel one of the nights October 23-24 and in the officers' quarters the other night. Atlass, who had slept in the master stateroom, moved to a hotel on October 23 and returned to Chicago on October 24.

19. When Atlas left Detroit on October 24, he told Johnson that he was in charge and that the yacht was to be repaired and readied to continue to Florida. Thereafter, Johnson gave directions and orders and paid for meals eaten by the men.

20. While the yacht was on the marine rail, Muth and Wasilas painted the mess hall and the galley, and Mendel weaved lines and ropes.

21. On the marine rail, the "Sis" faced north. Scaffolding was erected along the yacht's starboard side and at her bow. Near the edge of the rail bed, east of the starboard side scaffolding, there were eight stanchions lined in a north-south row, 13 feet apart. The base of each such stanchion was 15 inches wide. Between the second and third and also between the seventh and eighth stanchions (from the north), there were steel cross pieces, each an inch in diameter, which crossed at a height of five and one-half feet.

22. Immediately east of the eastern edge of the rail bed was a 32 inch gap below which was water. At a point opposite the midpoint between the first and second stanchions (from the north), the water was 10-15 feet deep.

23. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway the northernmost 65 foot length of which was about five feet wide. The level of this walkway was approximately two inches below that of the rail bed.

24. Abutting the east edge of this walkway was a boat shed, 24 feet high. The shed's west wall consisted of a concrete base, four feet high, and panes of glass above the base.

25. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row. These rows were located 15 feet and 36 feet, respectively, east of the shed's west wall. The northernmost and southernmost fixture in each row was about 16 feet from the north and south ends, respectively, of the shed. Each fixture was 24 feet above the level of the dock, and within each row each fixture was 16 feet from the next. Each fixture housed a 200 watt incandescent bulb with an RLM dome-type reflector.

26. The marine rail bed was 101 feet long and 34 feet wide. Along its north (or inshore) end, for 12 feet west from its northeast edge, there was a 19 inch gap north of which was a dock. This dock abutted the north end of the rail bed without any gap for 10 feet west of that portion of the north edge of the rail bed which was separated by a gap from the dock. Along the entire north edge, the water was 3-4 feet deep.

27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap.

28. Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were

taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages.

29. Muth, Darr and Smith left Garvin's Bar together. Muth soon commenced staggering and had to be assisted by the other two. At one point, Muth slipped and fell into the street and had to be aided to his feet.

30. The three proceeded to the Detroit Yacht Basin where the outside door to the boat shed was locked. They rang for the night watchman who came, turned on the overhead lights in the shed and unlocked the door to let them pass through. As they did so, Muth was staggering and Darr, on Muth's left, was assisting him. Smith followed, a few steps behind.

31. The three men turned south down the walkway. Opposite a point between the first and second stanchions, about 15 feet south of the northern terminus of the walkway, Muth fell into the gap between the walkway and the rail bed. Immediately, Darr jumped in to try to save Muth.

32. Wasilas and Mendel, both asleep on the yacht, were awakened by Smith's cries for help. By the time they reached the walkway where Smith, who was unable to swim, was shining a flashlight into the water. Darr had disappeared from sight. Wasilas and Mendel jumped into the water to assist Muth, but they were unable to rescue him.

33. At the time of the drowning, no member of the crew had been discharged either by Atlass or his authorized agent.

34. Muth and Darr had a more-or-less permanent connection with the relevant voyage of the "Sis".

35. The services which Muth and Darr performed on the "Sis" were maritime in character.

36. At the time of the drowning, the "Sis" was a vessel in navigation.

37. Minimum levels of lighting recommended by the Illuminating Engineering Society are the following: general areas of shipyards, 5 foot candles; freight and passenger piers, 20 foot candles; inactive pedestrian and/or conveyor entrances normally locked and infrequently used, 1 foot candle.

38. At the time of the drowning, illumination on the walkway, dock and rail bed was less than one foot candle.

39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient.

40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death.

41. Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings.

42. On March 15, 1961, the "Sis" was sold by Atlass' estate for $30,000. In 1952, Atlass had asked $85,000 for the yacht. In 1954, he had reduced the price to $75,000, and in 1956, he again offered to sell her for this amount. In 1956, the replacement cost of the "Sis" was more than $100,000. In 1962 and 1963, several qualified marine appraisers retained by the petitioner expressed opinions as

to the fair market value of the "Sis" in 1956 which ranged between $25,000 and $35,000.

43. The fair market value of the "Sis" on October 26, 1956, was $50,000.00.

44. On March 22, 1957, claimant Catherine Muth filed in this Court civil action No. 57 C 528 stating a claim against Atlass under the Jones Act, 46 U.S.C. § 688. On April 22, 1957, the instant proceeding was commenced by Atlass, filing a petition for limitation of or exoneration from liability. On October 23, 1959, claimant Mollie Darr filed civil action No. 59 C 1692 against Atlass and CBS, under the Jones Act. Shortly thereafter, claimant Muth filed civil action No. 59 C 1697 against CBS, under the Jones Act. Atlass died on November 18, 1960, and his executors were substituted as the petitioners in the instant action. Upon the execution of a covenant not to sue, both claimants settled their suits against CBS.

45. On October 26, 1956, Muth and claimant Catherine Muth had a joint life expectancy of 24.63 years; Darr and claimant Mollie Darr had a joint life expectancy of 21.04 years.

46. If they had survived, Muth and Darr both would have retired upon reaching the age of 65. On October 26, 1956, therefore, Muth had a work expectancy of 23 years, 6 months, and Darr had a work expectancy of 18 years, 2 months.

47. Muth and Darr each spent 25% of his income on himself.

48. Claimants Catherine Muth and Mollie Darr each received $12,500.00 from CBS in exchange for a covenant not to sue.

49. Muth and Darr each would have received biennial wage increases of 4% from the expiration of the present contract until the date of their retirement.

Conclusion of Law

1. The Court has jurisdiction over the instant litigation.

2. Muth and Darr were seamen within the meaning of the Jones Act, 46 U.S.C. § 688, at the time of their deaths. See Carumbo v. Cape Cod S. S. C., 123 F. 2d 991 (1st Cir. 1941).

3. From October 18, 1956, when the voyage commenced, to and including the time of the drownings, Muth and Darr were borrowed servants of Atlass', and accordingly he was their "employer" within the meaning of the Jones Act.

4. Under the Jones Act, an employer is liable for injuries to or death of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. This duty extends to an area in close proximity with the gangway or gangplank such as the place where Muth and Darr drowned. Cf. Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945).

5. Negligence of seamen-employees which proximately contributes to their injury or death reduces proportionately the amount of damages which may be recovered of the employer.

6. Atlass' liability to claimants Catherine Muth and Mollie Darr is limited to the fair market value of the "Sis" as of the date of the drownings. 46 U.S.C. § 183.

7. In determining present values in this case, a discount factor of 5% should be used. In calculating interest in this case, an interest rate of 5% should be used.

8. The following damages, which must be reduced by 50% (the contribution to Muth's death of his own negligence), have been sustained by claimant Catherine Muth:

a. Muth's lost wages from CBS employment from the date of his death to date, reduced by 25% (which he would have spent on himself), plus

b. the present value of Muth's future lost wages from CBS employment from the present to the date of his retirement, reduced by 25%, plus.

c. the present value as of his death, plus interest to date, of $500.00 per year for 24.63 years as compensation for services performed around the house and for parental guidance, plus

d. the present value as of his death, plus interest to date, of Muth's pension rights at his retirement, less the amount already received therefor by Mrs. Muth.

9. Mrs. Muth is not entitled to compensation which Muth might have received as a result of his continuing to serve as president of his union local because the duration of such term of office cannot be determined with a reasonable amount of assurance.

10. The following damages, which must be reduced by 30% (the contribution to Darr's death of his own negligence, have been sustained by claimant Mollie Darr:

a. Darr's lost wages from CBS employment from the date of his death to date, reduced by 25% (which he would have spent on himself), plus

b. the present value of Darr's future lost wages from CBS employment from the present to the date of his retirement, reduced by 25%, plus

c. the present value as of his death, plus interest to date, of $500.00 per year for 21.04 years as compensation for services performed around the house and for parental guidance, plus

d. the present value as of his death, plus interest to date, of Darr's pension rights at his retirement, less the amount already received therefor by Mrs. Darr.

11. Mrs. Muth and Mrs. Darr are entitled to aggregate damages totalling $50,000.00. Mrs. Muth is entitled to that percentage of the $50,000.00 which her damages as described in Conclusions No. 8 reduced by the amount which

she received in exchange for her covenant not to sue bear to the sum of such reduced damages plus Mrs. Darr's damages as described in Conclusion No. 10 reduced by the amount which she received in exchange for her covenant not to sue; Mrs. Darr is entitled to the remainder of the $50,000.00.

Enter:

Hubert L. Will
Judge

APPENDIX 1C.

STATUTES AND REGULATION

1. Statutes

46 U.S.C. §183 (a)

"The liability of the owner of any vessel, • • • for any act, • • • done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not • • • exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." R.S. §4283; Aug. 29, 1935, c. 804, §1, 49 Stat. 960; June 5, 1936, c. 521, §1, 49 Stat. 1474.

46 U.S.C. §187

"Nothing in sections • • • 183 • • • of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers or seamen, for or on account of • • • any negligence • • • of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." R.S. §4248.

46 U.S.C. §688

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway em-

ployees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

45 U.S.C. §51

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its * * * boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685 §1, 53 Stat. 1404.

45 U.S.C. §53

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held

to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

45 U.S.C. §54

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statutes enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

2. Regulation

46 C.F.R., §25.25-15 (a)

"The life saving equipment on all vessels shall be so placed as to be readily accessible."

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No. 709

In the

Supreme Court of the United States

OCTOBER TERM, 1965

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, Deceased,

Petitioner,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Respondents.

No. 733

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

In the Matter of the Petition of H. Leslie Atlass for Exoneration from or Limitation of Liability as the Owner of a Certain Vessel known as the Yacht SIS

MOLLIE DARR, Administratrix of the Estate of Kurt Darr, Deceased,

Petitioner,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Respondents.

REPLY TO PETITIONS FOR CERTIORARI

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LIST OF AUTHORITIES

	PAGE
The S.S. Berwindglen, 88 F. 2d 125 (CA 1)	4
Chicago, G. W. Ry. Co. v. Minneapolis, St. P. & S.S.M. Ry. Co., 176 Fed. 237, 242 (CA 8, 1910)	8
Graver Tank Mfg. Co. v. Linde, 336 U. S. 271, 275 (1948)	4
Guzman v. Pichivello, 369 U. S. 698	12
Inman v. B. & O. Ry. Co., 361 U. S. 138, 141 (1959)	8
Lee v. Pure Oil Company, 218 F. 2d 801, 806 (CA 6)	19
McAllister v. U. S., 348 U. S. 19	12
McDonough v. Buckeye S. S. Co., 103 F. Supp. 473, aff'd. 200 F. 2d 558 (CA 6)	16
Mercer v. N. Y. Trap Rock Corp., 91 F. Supp. 434, 438 (D.C. N.Y. 1950)	8
Robinson v. Northeastern SS Corp., 228 F. 2d 679 (CA 2); cert. den. 351 U. S. 947	16, 17
Schlichter v. Port Arthur Towing Co., 288 F. 2d 801, 806 (CA 5)	19
Trost v. American Hawaiian SS Co., 324 F. 2d 225; cert. den. 376 U.S. 963 (1964)	18

STATUTES.

Admiralty Rule 46½	7
F.R.C.P. 52	7

IN THE

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Petitioner,

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Respondents.

REPLY TO PETITIONS FOR CERTIORARI

Petitioners have allowed controversial zeal to carry them into extravagant and unwarranted assertion and assumption.

Some of this is corrected in the Reply to Petition for Rehearing filed by these Respondents in the court below (to which the reader is respectfully referred in order to avoid repetition here).

In what follows we shall try as briefly as possible to correct the rest, hoping that in the end we shall not have overlooked possible misapprehensions that the Petitions are designed to stimulate. In the end, their "Questions Presented" do not arise.

The leading facts are not complicated. They are not disputed any more. Two men got drunk, one of them so helplessly drunk that he could not stand up if he were not held up whether it was noon or midnight. He fell, first in the street when two men were trying to hold him up, and a few minutes later off a shipyard's dock; whereupon the other intoxicated man (then the only one trying to hold him up), jumped in after him because, as the trial court observed, he also was drunk, and both drowned.

Their estates sued by the same counsel who appear here, who waived trial by jury of the issue here involved. (PA 6-7)[1]

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[1] When it becomes pertinent to make abbreviated references (as here, for example, to correct counsel's insinuations that the right of jury trial is somehow involved) they are as follows:

Op: The Opinion of the Court of Appeals (Appendix A hereof)

FF: Findings of Fact by the trial court (Appendix B hereof)

A: Appendix printed by Petitioners Muth and Darr in the Court of Appeals

PA: Appendix printed by these Respondents, Harriet M. Atlass and Chicago Title & Trust Company in the Court of Appeals

They are Petitioners here; they were *Appellants* below, *attacking* Findings of Fact made by the trial court.

The trial court found that in the small hours of the morning of October 26, 1956, in Detroit, Michigan, one of these deceased "seamen"[2] (Muth) fell in and the other (Darr) jumped in off the shipyard's dock, 15 feet from the north end of a dock walkway, which had become "obstructed" by "debris and other obstacles"—"considering" which the lighting "at the time of the drownings was insufficient;" that the owner of the vessel on the rail-bed in the shipyard (Mr. Atlass, the Respondents' decedent) who was in Chicago was not responsible for the hazardous condition of the walkway as it existed at the time of the drowning; that the intoxication of Muth and Darr made them "partly responsible" for their deaths inasmuch as they knew all existing conditions when they were getting themselves intoxicated.

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[1] (Continued)

Other abbreviated references:

PD: Petition of Darr

PM: Petition of Muth

P. Rhg: The Petitioners' joint Petition for Rehearing in the Court of Appeals

R.P. Rhg: Respondents' Reply thereto

[2] The Court of Appeals did not disturb Findings of the trial court that Muth and Darr were, respectively, a painter (the president of his union) and an electrician, both long-time employees of CBS and still in its employ (FF 3 and 5) while going with Mr. Atlass, an executive of that company and owner of the yacht SIS on a voyage that started out for Florida (FF 7), and thus *pro tempore* "seamen" (FF 11, 12).

The reference of the Darr Petition to "well known propensity of seamen for partaking of alcoholic beverages" (PD 2) is artificially conceptual; its statement (PD 9) that the Court of Appeals disturbed these findings (held "That Darr was not a seaman") is untrue (it remarked

Petitioners, as Appellants below, attacked the trial court's findings of fact that inculpated the deceased Muth and Darr and acquitted Mr. Atlass personally.

The Court of Appeals, however, examined the Findings of Fact made by the trial court with scrupulous care, as its opinion shows, and upheld the Findings Petitioners attacked. Petitioners are, therefore, confronted here with concurrent findings below that Mr. Atlass, personally, was not responsible for any causative hazard of the walkway as it existed at the time of the drownings, and that intoxication of Muth and Darr was a proximate cause of their deaths. *Graver Tank Mfg. Co.* v. *Linde,* 336 U.S. 271, 275 (1948).

The Petition of Darr wholly ignores the concurrent finding that acquits Mr. Atlass personally. (Petition of Darr, *passim*) The Petition of Muth attacks it with a curious argument, hinted at but not explained until it comes to a discussion of matters on which the Petition, admittedly, is not based (PM 3). It then argues that the trial court meant only that Mr. Atlass was not negligent enough to be charged with "privity and knowledge" under the Limitation Act (PM 18).

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[2] (Continued)
that it is a far-fetched idea that they were in the course of their employment as seamen when they were getting drunk in a bar and returning to the yacht one in a drunken stupor and the other badly intoxicated—Op. 9a; see R.P.Rhg. 6, 7) and the fact is that the painter and electrician got drunk (Op. 6a-7a) whereas Smith, the regular seaman (FF 7) who was with them (Op. 7a) did not (A. 52, 36, 40). "A little recreational drinking" is one thing (Op. 7a, 8a); bad intoxication and stuporous drunkenness is a classic example of the gross misconduct that violates a seaman's duty to his employment (Op. 7a); *The SS Berwindglen,* 88 F. 2d 125 (CA 1) and many other cases.

That is not what the trial court said in its Finding (which we suppose is to be respected as its considered statement of what it found on the facts). (Op. 13a, 17a). It is not what the trial court said on another occasion at Petitioners' Appendix page 61, to which the Petition refers in this connection, where the trial court said:

> "Negligence *in Jones Act cases* has to be something more positive, more direct, and more proximate, in my judgment, than Mr. Atlass in Chicago at the time when an accident occurs." (A. 61) (Our emphasis)

It is not privity and knowledge under the Limitation Act that the trial court speaks of here, but causative negligence under the Jones Act; and it then acquitted Mr. Atlass "personally" (FF 41).

The Petition of Muth, in a footnote at page 19, resorts to the assertion that the trial court did not mean what it said here, either. Contrary to Petitioner's assertion, the fact that the trial court's judgment visited Jones Act liability on Mr. Atlass obviously does not mean that it was for any *personal* negligence of his; the trial court made it very plain that it was not. (*Ubi supra*)

The Petition of Muth then asserts that the trial court was "confused" and "admitted its confusion." Nothing the trial court said in its finding nor its statement manifests the "confusion" of which it is accused. (It is the *Petition* that attempts to create an irrelevant "confusion" by out-of-context reference to Respondents' brief in the Court of Appeals.) The trial court, on the contrary, made it clear that, if Mr. Atlass *personally* were guilty of any causative negligence (whether of omission or commission) he could not have limitation of liability, saying:

> "I have determined that Mr. Atlass was not personally negligent in that nothing he did or failed to do was a proximate cause of the death of these gentlemen, and therefore the principle of limitation of liability is applicable." (A. 60)

It is difficult to see how the trial court could have made it any more plain on this record that it acquitted Mr. Atlass personally of any causative negligence whether of omission or commission; it did *not find* that when he was there the walkway was "obstructed" (by "timbers," "planks," "debris" or "other obstacles").[3] It did *not find* that *in the absence* of such "obstructions" of the walkway the lighting of the walkway was insufficient for sober, able-bodied adults merely walking there; the trial court did *not find* that the "staggering" Muth (FF 31) was *attempting to step across the gap* to the rail bed.[4] It found that the staggering Muth "fell" when he got only 15 feet from the north end of the walkway and "went down" there, with only the intoxicated Darr to hold him

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[3] It found that Mr. Atlass left Detroit for Chicago on the 24th (FF 19) and that it was shortly after 2:00 A. M. on the 26th when Muth and Darr left the tavern (FF 28). It stated:

> "* * * I am satisfied that an absent shipowner, who, on this record, never saw the conditions at midnight or 2:00 o'clock in the morning, who I think could not reasonably be held to have known that there were conditions which were less than adequate for safe ingress and egress, is not personally liable." (A. 60)

As to imputed negligence of Mr. Atlass's servants (as mentioned below) the Court of Appeals presently points out that there was no obstruction by debris or other obstacles that interfered with Muth or Darr as they proceeded down the walkway on the later occasion, either. (Op. 13a, 14a)

[4] "There was no proof that Muth was attempting to cross the gap at that unusual point." (Op. 6a)

up (FF 30, 31) and that Muth had already "fallen" and "gone down" a few minutes before in the street when *both* Darr and Smith were trying to hold him up. (FF 29)

The trial court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings." (FF 41)

These findings were made by *the trial court* pursuant to the trial court's announcement after the conclusion of all the evidence, as above quoted, that it had "determined that Mr. Atlass was not personally negligent in that nothing he did or failed to do was a proximate cause of the deaths of these gentlemen," etc. (*Ubi supra*)

On their joint Petition for Rehearing to the Court of Appeals Petitioners' argument was expressly, what it implicitly and in fact is here, namely: that a trial judge "could" infer something that would convict Mr. Atlass of causative negligence (P. Rhg. 3). But *that* is the question when an appellate court inquires whether the general verdict of a jury can be sustained. (Petitioners rely on many such cases here.) Petitioners waived trial by jury. (PA 6) It is very familiar that when trial is by the court, it is required to state its Findings of Fact (and to state them separately).[5]

The question before the reviewing court then is not what it "could have" found.

The whole thrust of assertion and insinuation (and elision) in the Petitions is that the trial court did not make Findings of Fact that it *did* make, and that it made

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[5] F.R.C.P. 52; Admiralty Rule 46½.

Findings of Fact *that it did not make,* as just pointed out. Upon that false base they erect a *non-sequitur* that the Court of Appeals held things that *it did not hold.*

The Petitioners failed to show that the trial court's finding acquitting Mr. Atlass personally of causative negligence was "clearly erroneous" on this evidence, which (as the Opinion points out (Op. 6a) *and the Petitions nowhere deny* (Petitions, *passim*) is undisputed as to the fact that this walkway was used by Muth and Darr themselves and everybody else, including women in skirts (Op. 15a; PA 74, 46-47, 121), by day and by night without any trouble (Op. 6a, 14a-15a) and had been for many years (Op. 15a) if only they were sober, as Muth and Darr certainly were not (Op. 7a). That cogent evidence alone supported the trial court's acquittal of Mr. Atlass personally as to permanent conditions at the shipyard.[6] And there is much more, as the opinion points out.

Just as the Appellate Court regarded what the trial court *did* (and did *not*) find, so also it regarded, as was equally its duty, all pertinent facts insofar as shown by overwhelming proof in the record. When these put findings of the trial court in true perspective it refers to that record. In such instances the Petitions complain that the Appellate Court had no right to look at it. They cite no decision of this Court that so holds. To the best of our knowledge this Court has never so held.

Thus, both courts below found that the staggering Muth fell off the dock because he was drunk and both found that the intoxicated Darr (who failed to hold the even

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[6] *Chicago, G. W. Ry. Co.* v. *Minneapolis, St. P. & S.S.M. Ry. Co.*, 176 Fed. 237, 242 (CA 8, 1910); *Inman* v. *B. & O. Ry. Co.*, 361 U. S. 138, 141 (1959); *Mercer* v. *N. Y. Trap Rock Corp.*, 91 F. Supp. 434, 438 (D.C. N.Y. 1950).

more intoxicated Muth up) then deliberately jumped in after him, when neither man was in condition to help himself or the other, because he was drunk.[1] Rational consideration of the real reason for the occurrence would seem to begin with the degree of their intoxication. The Appellate Court vigorously corrected the trial court's "tepid" finding "as to the degree of their intoxication." (Op. 7a) The Petitions which labor, by insinuation and by incorrect and elided statement, to create a mirage of non-existent differences between the Findings of Fact actually made by the courts below, significantly ignore this actual difference, except to *concede* the correctness of the *Appellate* Court's view of the fact.

The Petition of Darr concedes: "Muth apparently became helplessly [sic] intoxicated" (PD 5) and then discreetly passes over the intoxication of Darr—apparently forgetting that the intoxicated Darr deliberately jumped in and only when the intoxicated Muth fell in (FF 31); and that what is attributable to Muth's admittedly helpless intoxication is no more chargeable to these Respondents than Darr's own intoxication. The Petition of Muth concedes: "Muth was admittedly [sic] in a helpless [sic] condition when he left the tavern." (PM 16) (It was not the trial court, but the Appellate Court—in considering the reason for the occurrence—that found Muth was "helpless" (Op. 7a). The Petitions both concede as just quoted that *the Appellate* Court's statement of the fact is correct.) Muth had to be practically carried; he was so drunk he had to be held up (A. 57).

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[1] Both men could swim (FF 6). A few strokes would have carried them inshore to where the water was only 3 or 4 feet deep (FF 26). In their condition neither could so much as stay afloat, or even avail of immediately proffered rescue. (Op. 16a)

As to *why* Muth was helpless, the Petition of Muth (in a statement calculated to obscure the above difference between the findings of the courts below as to the *fact* that Muth *was* "helpless") now says it reluctantly "accepts" it as "conclusive" that: "Both [sic] courts below found this helpless [sic] condition was brought about by Muth's excessive drinking of intoxicating liquors" (PM 16). In a footnote thereto the Petition of Muth says that "the finding is even more difficult to accept as to Darr as no one but the waitress gave any testimony that he was drunk."

"The waitress" (who first saw the pair, with Smith, just after they left the tavern) did, indeed, testify that Darr was drunk and in a staggering condition (A. 36). She also saw Darr fail to keep Muth from falling off the sidewalk into the street *even with Smith's help, at that time.* (A. 36, 57-58) She also saw that Smith was not drunk, (A. 36) as others confirmed (A. 45, 46) and saw the three start off in the direction of the shipyard with Smith in the middle and the weight of the two staggering drunks on his shoulders (A. 37, 43).

In corrective comment on the trial court's "tepid" finding (that the drinking of Muth and Darr was a proximate cause) the Court of Appeals said:

> "This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other." (Op. 7a)

As mentioned, the Petitions do not now challenge this.[8]

When Smith, Darr and Muth arrived at the shipyard the doors proved too narrow for three abreast (PA 180). The staggering, near-helpless Darr now attempted to take charge of the stuporous, helpless Muth who had to be held up. (Op. 6a)

It is in the context of what now occurred that the full significance of the Appellate Court's conceded correction of the findings "as to the degree of their intoxication" appears. The staggering intoxicated Darr now attempted to hold up the *helpless, stuporous* Muth alone, and on his right. They could have gone straight ahead from the dock house to the place at the head or north end of the rail bed (itself 34 feet wide), where it abutted the dock with no gaps for a width of ten feet, and so had access to the rail bed by this "inshore route." (Op. 6a, FF 26) Instead, they turned left and headed down the walkway. (Op. 6a) They only got 15 feet from the door of the walkway when the staggering, helpless, stuporous Muth fell again, this time from the grasp of the staggering, intoxicated Darr alone, and this time off the dock. (Op. 6a-7a, FF 31)

Confronted with this, the Petitions abruptly diverge; the Petition of Darr ignores that the inshore route could be used. (PD, *passim*)

The finding (it is quoted by the Opinion, pp. 12a-13a) refers to "scaffolding." The further finding (quoted in the Opinion, pp. 12a-13a) says the walkway route was the one "most frequently" taken. Aware of this, the Muth

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[8] In their joint Petition to the Court of Appeals for Rehearing Petitioners finally conceded:

> "Muth was helpless and, as this Court infers, *in a stupor*." (P. Rhg. 10) (Our emphasis)

Petition refers to part of the evidence that the inshore route where there was no gap (FF 26) was used, specifically to the statement of a witness that it would be taken when something heavy was being carried (PM 10)—to which, understandably, the Darr Petition does not wish to call attention—and ignoring the uncontradicted statement of the same witness that the "scaffolding" did not interfere with its use (PA 130), as well as the statements of Petitioner's witnesses Wasilas and Mendel that the inshore route was used, and used by Muth and Darr (PA 46-47) by day and night (PA 74), and the statements of the other witnesses who testified on the regular use of the inshore route (PA 120; 184-185).

The significance of the now-conceded correction made by the Court of Appeals of the tepid finding of the trial court "as to the degree of their intoxication" is ignored by both the Petitions. It would seem apparent in the context of the situation. Muth was indeed staggering (FF 29). He was also in a *helpless,* drunken *stupor* as Petitioners finally admitted in their Petition for Rehearing (Note 8, *supra*) unable to stand anywhere without falling. That correction by the Court of Appeals of the trial court's statement of the predicate of the whole situation is not a disregard of the *McAllister* or *Guzman* cases (*McAllister* v. *U.S.,* 348 U.S. 19; *Guzman* v. *Pichivillo,* 369 U.S. 698) as Petitioners assert (PM 2, 13; PD 10) if only because it is no longer contested (*ubi supra*). The Petitions are merely fictional when they try to isolate the trial court's other findings from that critical and conceded change made in the trial court's findings to conform to the realities, and pretend that any decision of this Court forbids a Court of Appeals from making an *admittedly correct change* in the factual situation a basis for *a difference in result.*

This was not the only such basis.

The trial court found that the staggering Muth (actually, by admission, the *helpless, stuperous* Muth) "fell" (for the second time) when he and the intoxicated Darr got only *15 feet from the door at the north end of the walkway.* (FF 31, Op. 6a, 14a) It also referred to "obstructions" of the walkway. Accordingly, the Court of Appeals searched the record. Neither Petition brings forward anything in the record to the contrary of the Appellate Court's statement thereof:

> "That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on that walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioner's seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which inter-

> fered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap." (Op. 13a-14a)*

It was "considering" debris and other obstructions on the walkway that a totality of conditions arose in which the trial court found the lighting insufficient (Op. 13a). Again the Petitions are merely fictional in trying to isolate the findings of the trial court from the critical corrections made by the Court of Appeals in the factual situation, corrections which Petitioners bring forward nothing in the record to contest. On the actual record there was no debris (PA 136-137) nor any obstacle (*ubi supra*) on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk to require more lighting where the admittedly helpless Muth in his drunken stupor fell for the second time. The Court of Appeals points this out, as above quoted. Neither Petition refers to *one word* in the record to the contrary. (Petitions, *passim*)

Here again the Petitions are merely fictional when they pretend that *McAllister* or any other case forbids a change in result based on uncontested corrections by the Court of Appeals in the factual situation portrayed by the lower court's findings; and especially so when there is no *finding* below that is thereby contradicted.

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*The Petition of Muth (PM 11) refers to a "power line" although neither court below does and there is no proof or claim that it was where Muth fell, 15 feet from the north end of the walkway (PM *passim*) any more than the planks referred to by the Court of Appeals. Parenthetically, Petitioners stipulated at the trial that the planks on the walkway were located as shown in the photographs mentioned by the Court of Appeals, which is not where both courts found Muth "fell," 15 feet from the door at the north end of the walkway. (FF 31; Op. 6a)

> "The [trial] Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurrence." (Op. 15a)

When the Petitioners argue that, on the predicate of the situation portrayed in the trial court's findings it could have drawn such an inference (although it made no such finding) they overlook that the predicate on which they argue that such an inference could have been drawn is critically changed and that they are unable to contest the change.

In the real (and now conceded) factual situation Muth was a staggering, helpless, stuporous, falling-down drunk who could not stay on his feet anywhere and the walkway where he again fell was clear there of debris or obstruction to interfere with the progress of the staggering, *helpless* drunk in his intoxicated *stupor* and his staggering, intoxicated companion. The trial court did not "infer" that poor lighting caused Muth to fall (again) on that predicate. Indeed, even on its own predicate, the trial court was unwilling to find as a fact that the lighting caused him to fall, in whole or in part. (*Ubi supra*) In that situation Petitioners suggest no decision of this Court that would require the Court of Appeals so to find. It is familiar that it is not the function of this Supreme Court to supply findings of fact that have not been made below.

The Muth Petition says there was no "usual" or "indicated" place, when one used the walkway route, for stepping across the gap (PM 10). The witnesses said that the place they regularly *did* step across when they took the walkway route was at the vessel's gangway lad-

der (which they had to use). (Op. 14a; PA 22-23, 42-43, 48, 60) [10] The location of the gangway ladder thus proved, in fact, a sufficient "indication" for everyone who testified as to the manner of using the walkway route. But over and above that, the rail bed abutted the dock with no gap, by the inshore route. (FF 26; Op. 5a) That would seem to be the "indicated" place for going onto the rail bed "with something heavy," such as a "helpless" drunk who had to be practically "carried."

Petitioners on Petition for Rehearing in the Court of Appeals reversed their field, conceding that Muth was in a *stupor* (P. Rhg. 10), but arguing that even stuporous intoxication was not the proximate cause, citing *McDonough* v. *Buckeye S. S. Co.*, 103 F. Supp. 473, aff'd. 200 F. 2d 558 (CA 6). As pointed out in the Reply to Petition for Rehearing filed by these Respondents, the Opinion of the Court of Appeals had answered that. (Op. 10a-11a; R. P. Rhg. 2)

The distinguishing basis of *The Buckeye* was: "There, the shipowner knew that was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice" and even instructed his other employees with respect thereto, one of whom negligently abandoned a helplessly drunken seaman on a narrow catwalk from which he fell (Op. 10a-11a)—all as pointed out in *Robinson* v. *Northeastern SS Corp.*, 228 F. 2d 679 (CA 2); cert. den. 351 U. S. 947.

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[10] The Muth Petition refers to colloquy in which the court said they could [sic] have crossed elsewhere (PM 10). We suppose that what is "usual" is what was, not what could have been, done.

Petitioners' argument of desperation on the legal doctrine of the "intervening cause" *that bears the whole responsibility* overlooks that, on the facts here, that doctrine operates against Petitioners themselves. As the trial court found, they knew all about the conditions at the water front, whatever they were, when they were getting themselves drunk (FF 40) and unlike the facts of *The Buckeye,* their employer had given them no reason to expect that his other employees would look after them when they got drunk (Op. 10a-11a) [11]

As for Mr. Atlass' other employees, Johnson and Smith, Johnson did not even know they were drunk (Op. 10a). Smith was not hired by Mr. Atlass to put drunks to bed (Op. 10a). Like anyone voluntarily undertaking a humanitarian act he assumed, for himself, an obligation to carry it out with ordinary care; Smith did not charge his employer with any negligence of his in that behalf, whether of omission or commission, because it was not within the scope of his employment (Op. 10a). This involved no conflict with the Sixth Circuit's decision in *The Buckeye,* as pointed out in the Opinion (Op. 10a) and as had already been pointed out by the Second Circuit in *Robinson* v. *Northeastern Steamship Corp.,* 228 F. 2d 679 (CA 2) which was followed here (and this Court evidently found no such conflict, for it denied certiorari in *Robinson,* 351 U.S. 947); and in *Trost* v. *American Hawaiian SS Co.,*

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[11] The Muth Petition cites State cases to the effect that public service companies who hold themselves out to the public to carry passengers for hire and who are therefore bound to look after drunken passengers cannot say, when they fail in that duty, that the drunkenness of the passenger is to blame (PM 17). Mr. Atlass was not a public service company; he did not invite the public; he had assumed no duty to put drunks to bed and had delegated none. *Robinson* v. *Northeastern SS. Corp.,* 228 F. 2d 679 (CA 2); cert. den. 351 U. S. 947, *supra.*

324 F. 2d 225, cert. den. 376 U.S. 963 (1964), which approved *Robinson* (Op. 11a). (Cf. *Reply to the Petition for Rehearing,* pages 5-11)

The Petition of Muth refers to what it calls "subsidiary" matters on which it expressly says the Petition is *not* based, that it expressly admits were not passed on below (PM 3), concerning which it believes the lower courts "need guidance" (PM 18). Since the Petition explicitly advises the Court, and these Respondents, that it is not based on such matters, we take the Petition at its word. Accordingly, they need no other response. We crave leave to add only that the further (and correct) statement of the Petition that such matters were not passed on below (PM 3) would seem, also, to render them moot. They present no case or controversy for the exercise of this Court's appellate jurisdiction. Tender of debate as to whether or not a case will ever seek to come here in which a Court of Appeals has passed on these or, indeed, any matters in a way disclosing need for "guidance," is an invitation to abstract speculation, and (admittedly) is not a request for judicial review. Admittedly, no error with respect to any of such "subsidiary" matters occurred in the Court of Appeals.

In sum, the Court of Appeals did not hold any errors that the Petitioners attribute to it by their incorrect and elided statements and assumptions; its holding conflicts with no decision of this Court, nor with that of any other Court of Appeals.

The Petition of Muth argues (the Darr Petition does not) that this vessel was in violation of the requirement of a Coast Guard regulation requiring the life-saving equipment on vessels to be readily available (PM 2, 15). Neither Court below found any factual basis for the

argument and in view of the facts as found by the courts below, it would seem to be frivolous on the bare statement of the Petition. The regulation, which refers to life-saving equipment "on" vessels, is not shown to have been violated when two "life rings" were removed from the starboard rail when the vessel was placed on the drydock (PM 15). This vessel, incidentally, was not even required to carry "life rings" as life-saving equipment, and moreover there *were* two other life rings on the port rail (A. 48) (the maximum width of the yacht was only 19.2 feet) (FF 8) and in addition to these "readily available" life rings there were "readily available" life preservers (A. 48).

Moreover, upon the point of Petitioners' burden of proof of causation, Petitioner Muth (who raises the "life-saving equipment" question) concedes that Muth was *helpless,* and, as conceded in Petitioners' joint Petition for Rehearing, after it had been pointed out by the Court of Appeals, he was in a *stupor* (PM 16; P. Rhg. 10; Op. 7a). What possible good would it do to throw a life ring to a man who is in a helpless, drunken stupor—who could not avail of Smith's immediately extended hand, or dangled rope, or the watchman's ladder? The irresistable answer is confirmed by the authorities. (*Lee* v. *Pure Oil Company,* 218 F. 2d 801, 806 (CA 6), (Opinion by Mr. Justice Stewart); *Schlichter* v. *Port Arthur Towing Co.,* 288 F. 2d 801, 806 (CA 5).

We trust that what has been said sufficiently restores the reality of the situation to make it unnecessary further to extend this Reply.

Respectfully submitted,

EDWARD B. HAYES
Proctor for Respondents

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964 — APRIL SESSION, 1965

Nos. 14872-14873

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, deceased, and MOLLIE DARR, Administratrix of the Estate of Kurt Darr, deceased,
Claimants-Appellants,

v.

HARRIET M. ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,
Petitioners-Appellees and Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 30, 1965

Before KILEY, SWYGERT and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This proceeding in Admiralty was initiated by H. Leslie Atlass as the owner of the yacht "Sis," under the Limitation of Liability Act (46 U.S.C.A. Secs. 183-189) and Rules 51-54 of the Rules

of Practice in Admiralty and Maritime Cases, for exoneration from or, in the alternative, limitation of liability under the Jones Act (46 U.S.C.A. Sec. 688), for the death by drowning of two seamen, Clem Muth and Kurt Darr. Their representatives appeared as claimants and answered the petition. Subsequently, petitioner died and the executors of his estate were substituted as parties. (In this opinion we shall use the term "petitioner" rather than the names of his substituted parties.)

The District Court, after a lengthy trial without a jury, made extensive findings of fact and entered its conclusions of law. It concluded among other things that Atlass as an employer was liable for the deaths of the two seaman-employees which allegedly were proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. The Court also concluded that Muth and Darr were in part responsible for their deaths by reason of their own negligence. The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr. Based on these conclusions an award of damages was made to the representative of each of claimants' estates.

From the Court's conclusion, embodied in its judgment, that petitioner was entitled to a limitation of liability, claimants appeal. From its conclusion, also embodied in its judgment, denying exoneration to petitioner, the latter cross-appeals.

While perhaps evident, we think it pertinent to note that if petitioner was entitled to exoneration, the issue as to limitation of liability is of no consequence. As the Court stated in The 84-H, 296 Fed. 427, 431 (C.A. 2):

> "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether

the loss or damage was occasioned or incurred without the 'privity or knowledge' of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends."

To the same effect see *Rautbord* v. *Ehmann*, 190 F.2d 533, 537 (C.A. 7).

It appears appropriate in the beginning to make a brief summary of the pleadings. The petition among other things alleged that petitioner was the owner of a certain vessel of the United States known as the yacht "Sis," of the registered dimensions of 101.5 feet in length, 19.2 feet in breadth and 11.1 feet in depth, and of 131 gross and 89 net registered tonnage, with home port at Chicago, Illinois, and that at about 3 a.m. on October 26, 1956, while the "Sis" was within the Admiralty and Maritime jurisdiction of the United States, upon a certain drydock in the harbor of Detroit, Michigan, Clem Muth and Kurt Darr dropped or jumped into open water in a gap between the shipyard dock and the drydock, and drowned, while apparently returning to the yacht after spending the evening and early morning ashore.

The petition alleged that petitioner at all times exercised due diligence to make the vessel seaworthy and in all respects fit for the uses and purposes for which she was used; that the deaths of the said Muth and Darr were in nowise caused by the fault of the "Sis" or the persons in charge of her, or of petitioner, or any other person for whose fault or neglect petitioner might be responsible, but was the direct and immediate result of the fault of Muth and Darr, or the result of inevitable accident. The petition further alleged that Catherine Eleanor Muth as administratrix of the estate of Clem Muth had brought an action in the District Court against petitioner, claiming damages under the Jones Act (46 U.S.C.A. Sec. 688) in the amount of $250,000.00, and that petitioner had reason to believe that the personal representative of Kurt Darr, deceased, would commence an action against petitioner arising out of the same casualty.

The representatives of Muth and Darr (claimants) answered the petition, denying its material allegations. Muth's answer alleged that the death of Clem Muth was the immediate and proximate result of the negligence and careless acts of petitioner, his agents, servants, workmen and employees, occasioned and incurred with the fault, privity and knowledge of petitioner in carelessly permitting certain unsafe and dangerous conditions to prevail, in failing to provide safe and proper equipment on said vessel and in failing to take reasonable precautions to provide safe working conditions. Among the acts of negligence alleged were that petitioner "Negligently failed to provide a reasonably safe place to work, a safe means of ingress to and egress from the vessel, a gangplank or other safe means of leaving or boarding the vessel, adequate and proper illumination or light in the boarding area." (Other acts alleged appear to be embodied in those stated.)

Darr's answer was substantially the same as that of Muth, alleging that his death was caused by the negligence of petitioner, his agents and servants.

We shall first make an abbreviated statement of the facts as found by the District Court. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. Among those aboard were H. Leslie Atlass, vice president of CBS in charge of its Chicago office, the registered owner of the yacht; Muth and Darr; Frank E. Johnson, a purchasing agent employed by CBS; Raymond Mendel, acting first mate, employed by Atlass; Robert L. Smith, engineer of the yacht, employed by Atlass, and John Wasilas, a painter employed by CBS.

On October 22, 1956, after having been stranded in the St. Clair River for two days, the yacht proceeded under her own power to the Detroit Basin, Inc., a shipyard in the Detroit River. On October 23, she was there placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail until after Muth and Darr drowned.

The marine rail was 101′ long and 34′ wide. Along the north (or inshore) end, it was level with the dock and there was a place 10′ wide to walk onto the marine

rail bed without stepping across any gap. The yacht faced north in its position on the marine rail. On the eastern edge of the rail bed there were eight stanchions lined in a north-south row 13′ apart. The base of each stanchion was 15″ wide. Between the second and third, and also between the seventh and eighth, stanchions, from the north, there were steel crosspieces, each an inch in diameter, which crossed at a height of 5½′.

Immediately east of the eastern edge of the rail bed was a 32″ gap, below which there was water. At a point opposite the mid-point between the first and second stanchions (from the north) the water was 10 to 15′ deep. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway about 5′ wide which extended north and south for a distance of 65′. The level of this walkway was approximately 2″ below the rail bed. Preparatory to doing repair work on the yacht, scaffolding was erected by the shipyard company on the starboard side and at her bow. While the yacht was on the marine rail, toilet and cooking facilities on board could not be used. Members of the crew slept on the yacht, although Johnson and Darr occasionally stayed on shore in a hotel.

Two means of ingress and egress were available, (1) a ladder between the rail bed and the gangway on the starboard side slightly forward of midship, which necessitated stepping across the gap, and (2) the north end of the rail bed which abutted the dock where there was no gap (inshore route). Abutting the east edge of the walkway was a boat shed, the west wall of which was 24′ high, all glass except for a 4′ concrete base. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row.

While the yacht was on the marine rail or before, Atlass (petitioner) was jointed by his son, Atlass, Jr., and his daughter, Harriet. On the morning of October 24, Atlass and members of his family left for Chicago, leaving Johnson in charge. Atlass was not again present at the yacht until after the fatal occurrence.

We now come to the events of the night of October 25, which culminated in the fatalities at about 3 o'clock the following morning. At about 7 p.m. (after dark), Smith,

Mendel, Johnson, Wasilas, Muth and Darr went ashore to eat. The group left by the route they had most frequently taken, going from the vessel gangway down the ladder on the marine rail platform and then stepping across the gap to the walkway. This was at a point about 50′ from the north end of the walkway where there was an entrance from the boat shed. The party could have used the inshore route that night, where it was not necessary to cross any water. Everyone, including Muth and Darr, had used the inshore route on previous occasions, both in daylight and dark. Mendel returned to the ship at about 8 p.m., and Wasilas at about 9 p.m.

After dinner, Johnson, Muth and Darr went to a movie, then to a tavern known as Garvin's Bar where they found Smith and took turns ordering rounds of drinks. Muth was drinking straight whiskey with beer chasers. The bar stopped serving drinks at 2 a.m., and shortly thereafter Muth, Darr and Smith left, having been in the tavern three hours. A few minutes later they appeared at the boat shed through which they must pass in returning to the yacht. Gildersleeve, who had been the night watchman for thirteen years, unlocked the shed, turned on the overhead lights and permitted the three men to pass through. Darr was attempting to hold Muth as they went through the door, three or four steps ahead of Smith. As they emerged on the walkway, Darr was holding Muth up. They could have gone straight ahead and reached the rail bed by the inshore route, but instead they turned left and started down the walkway. About 15′ from the door of the boat shed, Muth fell into the gap between the walkway and the marine rail platform. Darr jumped in right behind him. They both drowned. (There was no proof that Muth was attempting to cross the gap at that unusual point.)

While the degree of intoxication of Muth and Darr at the time of the fatal occurrence is highly important, we need not burden this opinion with a detailed recital of the testimony bearing thereon. The Court found:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially

more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into the gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other.

This perhaps is a pertinent point to make some observations as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. We find no Supreme Court case which has directly decided the point in an action for damages. However, *Farrell* v. *United States, et al.*, 336 U.S. 511, throws some light on the issue and it is pertinent because it contrasts the rights of the seaman under the two forms of action which are sometimes confused. In that case, the seaman sought to recover on both theories. The trial court sustained his action for maintenance and cure but dismissed it for damages. The Court of Appeals affirmed, *Farrell* v. *United States, et al.*, 167 F. 2d 781. The Supreme Court, in affirming the Court of Appeals, referred to a previous opinion and stated (page 515):

"In *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from a seaman's dependence on his shop, not from his individual deserts, and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from *gross misconduct* or insubordination, what the seaman is doing and why

and how he sustains injury does not affect his right to maintenance and cure, however *decisive it may be as to claims for indemnity or for damages for negligence.* [Italics supplied.]"

Thus, the Court indicates that gross misconduct, and we think the conduct of Muth and Darr must be so characterized, may be decisive in an action for damages based on negligence.

In *Wiper* v. *Erie Sand Steamship Co.*, 293 F. 2d 491, the Court affirmed the dismissal of a Jones Act case brought on the theory that the shipowner was negligent in permitting the seaman to go ashore when he was in a drunken condition. In rejecting the theory, the Court stated (page 493):

> "Whatever the 'parental' duty of a ship's captain may be, it surely does not require him to forcibly detain every crew member who has had a few drinks or who wishes to go ashore to do a bit of drinking for relaxation."

In *Schlichter* v. *Port Arthur Towing Company*, 288 F. 2d 801, in a damage action for the death of a seaman by drowning when he fell overboard, the Court sustained a judgment in favor of the vessel owner. The Court cited cases in support of the general rule that intoxication only mitigates damages but (page 803), "Of course, the result is different if the seaman's negligent intoxication is the sole cause of the injuries."

In *Barlow* v. *Pan Atlantic S.S. Corp., et al.*, 101 F. 2d 697, the Court affirmed a judgment denying the right of a seaman to recover maintenance and cure because of injuries sustained as a result of falling from a ladder while intoxicated.

In *The S.S. Berwindglen, Rawding* v. *Hooten*, 88 F. 2d 125, the Court sustained a judgment denying a claim for maintenance and cure for injuries sustained in attempting while intoxicated to climb a ladder leading to the dock.

Another case to be noted because of its similarity of facts is *Landy* v. *United States, et al.*, 101 F. Supp. 486. The action in Admiralty was brought by decedent's representative to recover damages under the Jones Act for a sea-

man's death occasioned by injuries sustained when he fell from a ladder while attempting to board a vessel. The owner was charged with negligence in failing to provide a safe means of ingress by reason of the defective condition of the ladder. The Court found that the seaman became intoxicated while ashore and returned to the vessel in that condition. Notwithstanding the Court's finding that the ladder was defective as alleged, it dismissed the claim on the basis that the seaman fell solely because he was intoxicated.

Prior to a consideration of the findings which form the basis for the Court's judgment against Atlass, we refer to an issue of importance, that is, whether Muth and Darr at the time of their deaths were engaged "in the course of their employment," a prerequisite to the right to maintain an action under the Jones Act. The issue is further in the case because of claimants' contention that Johnson and Smith, with knowledge of the intoxicated condition of Muth and Darr, were negligent in permitting them to return to the yacht and that such negligence was imputable to Atlass.

In *Braen* v. *Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 133, the Court stated:

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders."

Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.

Claimants attempt to meet this problem with the argument that the intoxicated condition of Muth was evident to Atlass' agents Johnson and Smith; that such agents were negligent in permitting his return to the ship; that they

were acting within the scope of their employment in so doing and that such negligence was imputable to Atlass. We think this argument is without merit. Pertinent to this point is the Court's finding:

> "Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages."

In the first place, there is no finding that Johnson had knowledge of the intoxicated condition of the two men. There is testimony that he went to the tavern with Muth and Darr, where they joined Smith and had some drinks. Later, time not disclosed, Johnson left the party and returned to his hotel. Thus, the most that is shown as to Johnson is that he knew they were in a tavern drinking intoxicating liquors. He did not accompany and had nothing to do with the return of Muth and Darr to the ship. On what theory he could be found negligent is not discernible.

Assuming without a finding, that Smith was negligent in accompanying and permitting Muth and Darr to return to the ship, such negligence could not be imputable to Atlass because Smith's activities, both affirmative and negative, were not within the scope of his employment. Certainly he was without authority and it was no part of his duties to protect drunk men in returning to the ship or to prevent them from so doing.

Claimants cite only one Federal case, *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473, affirmed 200 F. 2d 558 (C.A. 6), in support of their theory that Atlass is liable because of the negligence of his agents in taking Muth and Darr to the ship, a place of asserted danger. A comparison of the facts of that case with those here demonstrates that it is of no benefit to claimants. There, the ship owner knew that it was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice. In fact, the ship owner em-

ployed a guard at the gate who was charged with the duty of refusing admission to seamen returning in an intoxicated condition. The guard placed another employee in charge of the drunken sailor for the purpose of escorting him to the ship. Instead of discharging his responsibility, the other employee, midway on the journey, abandoned the intoxicated sailor, who later was found drowned. The Court under those circumstances properly held, we think, that the ship owner was responsible for the negligence of its employees who were acting under specific directions and thus undoubtedly in the course of their employment.

Any doubt as to the holding in *Buckeye* is dispelled by *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679 (C.A. 2), in which an action for damages under the Jones Act was dismissed. The Court stated (page 681):

> "There [referring to Buckeye] the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

The Second Circuit, as late as 1963, in a Jones Act case approved of the decision in *Robinson* and reversed a judgment in favor of the claimant (a seaman). *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225. As to *Robinson* the Court stated (page 228):

> "Although willing to assume that the assisting seaman was negligent and that the plaintiff's decedent was killed while in the course of *his* employment, this court

refused to hold the shipowner responsible. Rather, we held in *Robinson* that the particular act performed negligently, aiding an intoxicated seaman to return to his ship, was not within the scope of the negligent seaman's employment. [Citing cases.]"

Preliminary to a consideration of the findings relating to petitioner's negligence, it is pertinent to observe that there is no finding of negligence on the part of any person except Muth and Darr. As to Atlass, the Court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings."

Taking this finding at its face value, it would appear to exonerate Atlass from all responsibility for the asserted negligent conditions existing at the time of the occurrence. It may be that the Court while finding that Atlass was not personally responsible thought he was liable because of negligence of others imputable to him. If such be the thinking, there was, as noted, no finding that Johnson, left in charge of the ship when Atlass returned to Chicago, was negligent, and there is no finding that any other employee or agent of Atlass was negligent. It seems that if petitioner is to be held liable on an imputable negligence theory, he is entitled to know by whose negligence and of what it consisted.

In considering the findings as they concern the issue of petitioner's negligence, we recognize, without the citation of authority, two well established principles of law, (1) that an employer has a duty to provide seamen in his employment with safe and seaworthy appliances and a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel, and (2) that the burden of proof under the Jones Act to show negligence causally relating to the accident is on the seaman or his representative. Negligence is not presumed but must be affirmatively proved.

The findings as they relate to negligence, other than those referred to, are:

> "No. 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was ac-

complished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap."

"No. 39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient."

As already noted, there is no finding or conclusion by the Court that the condition portrayed by these findings was due to the fault or negligence of Atlass, Johnson or any other employee; in fact, the Court found that Atlass was not personally responsible. The stanchions and crossbars referred to were a part of the permanent rail bed structure. The shipyard company constructed the scaffolding preparatory to doing repair work on the yacht, and it was also responsible for the ropes and planks on the rail bed.

Assuming, absent a finding, that there was negligence on the part of petitioner's employees in permitting these so-called obstructions on the rail bed (west) side of the gap, they could not have contributed in whole or in part to the tragedy because Muth and Darr were on the walkway on the opposite (east) side of the gap when they fell or jumped into the water.

That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on the walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These

planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioner's seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap.

The Court's finding that "the lighting of the walkway, • • • at the time of the drowning was insufficient" is of a conclusory nature, based upon the opinion testimony of claimants' expert witnesses. Petitioner's expert witness expressed his opinion that the illumination on the walk was sufficient for the purpose of its use. These witnesses seemed to be in substantial agreement that the illumination was equal to that furnished to pedestrians on Chicago streets. The proof by witnesses who had personal knowledge of the condition is overwhelming that the illumination was sufficient for normal and ordinary use. No amount of illumination could have saved Muth and Darr from their own folly. That could have been accomplished only by placing a cover over the gap from end to end.

Smith, the only eye witness, testified that the point of the occurrence was about midway between the entrance to the walkway and the ladder, which had been in the same place since the yacht had been on the rail bed. He stated that "the lighting was good enough you could see to get around in out there because it was shining right through the glass on the platform out here and the walkway"; that he had been with Muth and Darr on previous occasions when they were crossing the gap between the walkway and the rail bed, and that they had no difficulty in seeing. Milton Pinkstaff testified that he had been employed by the shipyard as a carpenter for some fourteen years, that the rail bed had remained in the same

position during that time and that the gap was easy to step across. He arrived at the scene of the occurrence at about 3 a.m., and stated that there were no hoses, ropes or debris on the walkway, that the lights in the boathouse were on and that the lighting conditions were very good. Morton Gildersleeve testified that he had been employed by the Detroit Basin as a night watchman from 1948 to 1961, that when on duty he stepped across the gap two or three times each night and that during his employment no person other than Muth and Darr had fallen into the gap. He observed no debris of any kind on the walkway and stated that the lighting conditions were good. All members of the crew, including Muth and Darr, in daytime and at night, had stepped over the gap many times in leaving and returning to the yacht. Atlass' daughter testified that with her tight skirt and high heeled shoes it was an easy step. Raymond Mendel, a witness for claimants, testified, "There wasn't too much light that did come through them windows. It was like early evening, just between dark and evening, you know dusk." He admitted that flashlights were available on the yacht but were rarely needed. In a pre-trial statement, the witness said, "That was an easy step and I am sure everybody who was on the yacht and who I have mentioned, including Mr. Atlass' daughter, Sis, who was a girl in her teens, stepped across that gap without any trouble. I know that I saw Muth and Darr go onto the platform in both ways I have described."

The Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurrence. We think there is no basis for a reasonable inference that it was. The misconduct of claimants' decedents was solely responsible for their unfortunate demise.

In *Jackson* v. *Pittsburgh S. S. Co.*, 131 F.2d 668, the Court affirmed a judgment denying to a seaman a claim for damages under the Jones Act. It was there alleged that the boat owner was negligent in his failure to furnish a ladder or any other means of ingress and egress. The seaman desired to go ashore, jumped from the deck of the vessel to the dock, a distance of about six feet and sustained the injuries complained of. The Court assumed

that the owner was negligent in failing to provide a ladder but denied recovery because the misconduct of the seaman was the sole cause of his injuries. In doing so the Court stated (page 670):

> "When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. [Citing cases.]"

See also *Meintsma* v. *United States*, 164 F.2d 976, 977.

In conclusion, it seems in order to make a brief statement of the undisputed facts relative to the conduct of Muth and Darr after they were in the water. Smith who was unable to swim stepped to the gap, knelt down and directed his flashlight therein. He saw Darr trying to help Muth, but Muth was throwing his arms around and fighting Darr. Smith lay on the walkway with his left hand down into the gap about three or four feet. He braced himself with his right hand on the rail platform. Smith shouted several times for them to grab hold of his hand, and if either had reached up he could have done so, but neither did. Gildersleeve, the night watchman, was at the scene in a few minutes and saw Smith dangling a rope, trying to get Muth to grab it, holding it right in front of Muth's face between his outstretched arms. The rope actually came in contact with Muth's head and body but he did not take hold of it. Gildersleeve placed a ladder in the water but Muth would not take hold.

Mendel and Wasilas were asleep on the boat when they heard cries for help. Both came to the platform and jumped into the water in an effort to save Muth and Darr. At that time the latter had disappeared. They tied a tight line around Muth's body and gave the end of it to Smith. They then swam underneath the dock into the boat shed and climbed out of the water. Smith held Muth out of the water until their return. When they attempted to pull him from the water, he slipped through the loop and was not seen again.

Muth and Darr were middle-aged men, healthy and vigorous, and both were swimmers. The conclusion is inescapable that their total inability to aid themselves or each other after they were in the water was the result of their intoxicated condition, induced by their own voluntary acts. In contrast, Mendel and Wasilas, who were sober, were in the water for some ten minutes and had no difficulty in swimming to safety.

In our judgment, and we so hold, the deaths of Muth and Darr were the result solely of their own gross misconduct. It follows that the Court erred in its refusal to exonerate Atlass of all liability for loss or damage occasioned thereby. In view of this conclusion other issues discussed in the briefs need not be considered.

The judgment is reversed and the cause remanded for such further proceedings as are not inconsistent with this holding.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

194 FINDINGS OF FACT AND CONCLUSIONS OF LAW

(entered June 12, 1964)

This cause having come on for trial before this Court and memoranda having been submitted by all parties hereto, and being fully advised the Court now enters the following findings of fact and conclusions of law:

Findings of Fact

1. On October 26, 1956, at about 2:45 a.m., Clem Muth and Kurt Darr died from asphyxia by drowning in the Detroit River, Detroit, Michigan.

2. Muth was born on May 3, 1915. He and claimant Catherine E. Muth (who was born March 27, 1919) were married on November 25, 1944. Three children were born to them: Clem William, born November 29, 1947, Patricia, born December 27, 1951, and Phyllis, born February 9, 1954.

3. At the time of his death, Muth was employed by The Columbia Broadcasting System, Inc. (hereinafter re-
105 ferred to as "CBS"), in Chicago as a maintenance painter. He had been so employed for 4½ years. He was the president of Local 180, Painters District Council No. 14.

4. Darr was born on December 30, 1909. He and claimant Mollie Darr (who was born November 7, 1915) were married on May 4, 1935. Three children were born to them: Leighton, born June 16, 1938, Raymond, born December 16, 1943, and Janice, born February 28, 1946.

5. At the time of his death, Darr was employed by CBS in Chicago as an electronic technician. He had been employed by CBS and its predecessor corporation for 24 years. He was a member of the International Brotherhood of Electrical Workers.

6. Immediately prior to their deaths, neither Muth nor Darr was suffering from any disease or physical handicap apparent to a layman. Both knew how to swim.

7. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. The following persons, among others, were aboard at that time:

(a) H. Leslie Atlass, vice president of CBS in charge of its Chicago office, who was the registered owner of the "Sis" from the time he purchased her in 1947 until his death in 1960;

(b) Muth and Darr;

106 (c) Frank E. Johnson, a purchasing agent employed by CBS in Chicago;

(d) Raymond Mendel, Acting First Mate and Assistant Engineer of the "Sis," employed by Atlass;

(e) Robert L. Smith, engineer of the "Sis," employed by Atlass;

(f) John Wasilas, a painter employed by CBS in Chicago.

8. The "Sis" was a licensed pleasure yacht with a registered length of 101.5 feet, width of 19.2 feet and depth of 11.1 feet. Her gross and net tonnage were, respectively, 131.64 and 89.00 tons. She had two 16 cylinder pancake-type engines with a total of 2400 registered horsepower. Sleeping accommodations on board included a master stateroom, six bunks in the crew's quarters and officers' quarters which slept two.

9. At various times prior to October, 1956, CBS employees Muth, Darr and Wasilas had performed work aboard the "Sis" including painting, adjusting electronic equipment and handling lines on short Lake Michigan runs.

10. Shortly before the "Sis" sailed for Florida, Muth and Wasilas had applied one coat of paint to the hull, re-

sanded and revarnished the sides of the cabins and wheelhouse and painted the top deck. An additional two
107 coats of paint were to be applied to the hull when the yacht docked in Florida.

11. On the day that the "Sis" was to sail for Florida, Johnson, on Atlass' behalf, told Muth, Darr and Wasilas that extra deck hands were needed for the voyage, and he asked them to come along to work. They agreed to do so.

12. As the trip commenced, Muth, Darr and Wasilas assisted with the folding of the lines. Shortly thereafter, Muth, Darr and Mendel were instructed by Atlass (or, on his behalf, by Johnson) to install a watertight manhole cover near the yacht's bow. They attempted unsuccessfully to do so while the "Sis" was heading into a strong wind and high waves; later the vessel was turned and slowed, and the job was completed.

13. The following afternoon, Muth, Darr, Wasilas and Mendel cleaned, mopped and straightened up the deck.

14. At various times during the voyage, Muth, Darr and Wasilas kept watch. In addition, Darr steered some of the time.

15. On October 20, the yacht stranded in the St. Clair River. Everyone aboard, including Muth and Darr, assisted in efforts to dislodge her. She finally was freed on October 22 and proceeded under her own power to the Detroit
108 Basin, Inc., on the Detroit River.

16. On October 23, the yacht was placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail from that time until after Muth and Darr drowned.

17. While she was on the marine rail, ingress to and egress from the yacht could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of midships.

18. While the "Sis" was on the marine rail, toilet and cooking facilities on board could not be used. The crew continued, nevertheless, to sleep on board. Muth, Mendel, Smith and Wasilas, among others, slept in the crew's quarters as they had each night after the vessel left Chicago. Johnson, who with Darr had been sleeping in the officers' quarters, stayed in a hotel after October 23; Darr slept in a hotel one of the nights October 23-24 and in the officers' quarters the other night. Atlass, who had slept in the master stateroom, moved to a hotel on October 23 and returned to Chicago on October 24.

19. When Atlass left Detroit on October 24, he told Johnson that he was in charge and that the yacht was
109 to be repaired and readied to continue to Florida. Thereafter, Johnson gave directions and orders and paid for meals eaten by the men.

20. While the yacht was on the marine rail, Muth and Wasilas painted the mess hall and the galley, and Mendel weaved lines and ropes.

21. On the marine rail, the "Sis" faced north. Scaffolding was erected along the yacht's starboard side and at her bow. Near the edge of the rail bed, east of the starboard side scaffolding, there were eight stanchions lined in a north-south row, 13 feet apart. The base of each such stanchion was 15 inches wide. Between the second and third and also between the seventh and eighth stanchions (from the north), there were steel cross pieces, each an inch in diameter, which crossed at a height of five and one-half feet.

22. Immediately east of the eastern edge of the rail bed was a 32 inch gap below which was water. At a point opposite the midpoint between the first and second stanchions (from the north), the water was 10-15 feet deep.

23. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway the northernmost 65

foot length of which was about five feet wide. The level of this walkway was approximately two inches below that of the rail bed.

110 24. Abutting the east edge of this walkway was a boat shed, 24 feet high. The shed's west wall consisted of a concrete base, four feet high, and panes of glass above the base.

25. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row. These rows were located 15 feet and 36 feet, respectively east of the shed's west wall. The northernmost and southernmost fixtures in each row was about 16 feet from the north and south ends, respectively, of the shed. Each fixture was 24 feet above the level of the dock, and within each row each fixture was 16 feet from the next. Each fixture housed a 200 watt incandescent bulb with an RLM dome-type reflector.

26. The marine rail bed was 101 feet long and 34 feet wide. Along its north (or inshore) end, for 12 feet west from its northeast edge, there was a 19 inch gap north of which was a dock. This dock abutted the north end of the rail bed without any gap for 10 feet west of that portion of the north edge of the rail bed which was separated by a gap from the dock. Along the entire north edge, the water was 3-4 feet deep.

111 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was clut-

tered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap.

28. Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages.

29. Muth, Darr and Smith left Garvin's Bar together. Muth soon commenced staggering and had to be assisted by the other two. At one point, Muth slipped and fell into the street and had to be aided to his feet.

112 30. The three men proceeded to the Detroit Yacht Basin where the outside door to the boat shed was locked. They rang for the night watchman who came, turned on the overhead lights in the shed and unlocked the door to let them pass through. As they did so, Muth was staggering and Darr, on Muth's left, was assisting him. Smith followed, a few steps behind.

31. The three men turned south down the walkway. Opposite a point between the first and second stanchions, about 15 feet south of the northern terminus of the walkway, Muth fell into the gap between the walkway and the rail bed. Immediately, Darr jumped in to try to save Muth.

32. Wasilas and Mendel, both asleep on the yacht, were awakened by Smith's cries for help. By the time they reached the walkway where Smith, who was unable to swim, was shining a flashlight into the water, Darr had disappeared from sight. Wasilas and Mendel jumped into

the water to assist Muth, but they were unable to rescue him.

33. At the time of the drowning, no member of the crew had been discharged either by Atlass or his authorized agent.

34. Muth and Darr had a more-or-less permenant connection with the relevant voyage of the "Sis".

113 35. The services which Muth and Darr performed on the "Sis" were maritime in character.

36. At the time of the drawing, the "Sis" was a vessel in navigation.

37. Minimum levels of lighting recommended by the Illuminating Engineering Society are the following: general areas of shipyards, 5 foot candles; freight and passenger piers, 20 foot candles; inactive pedestrian and/or conveyor entrances normally locked and infrequently used, 1 foot candle.

38. At the time of the drowning, illumination on the walkway, dock and rail bed was less than one foot candle.

39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient.

40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death.

114 41. Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings.

42. On March 15, 1961, the "Sis" was sold by Atlass' estate for $30,000. In 1952, Atlass had asked $85,000 for the yacht. In 1954, he had reduced the price to $75,000, and in 1956, he again offered to sell her for this amount. In 1956, the replacement cost of the "Sis" was more than $100,000. In 1962 and 1963, several qualified marine appraisers retained by the petitioner expressed opinions as to the fair market value of the "Sis" in 1956 which ranged between $25,000 and $35,000.

43. The fair market value of the "Sis" on October 26, 1956, was $50,000.

44. On March 22, 1957, claimant Catherine Muth filed in this Court civil action No. 57 C 528 stating a claim against Atlass under the Jones Act, 46 U.S.C. § 688. On April 22, 1957, the instant proceeding was commenced by Atlass, filing a petition for limitation of or exoneration from liability. On October 23, 1959, claimant Mollie Darr filed civil action No. 59 C 1692 against Atlass and CBS, under the Jones Act. Shortly thereafter, claimant Muth filed civil action No. 59 C 1697 against CBS, under the Jones Act. Atlass died on November 18, 1960, and
115 his executors were substituted as the petitioners in the instant action. Upon the execution of a covenant not to sue, both claimants settled their suits against CBS.

45. On October 26, 1956, Muth and claimant Catherine Muth had a joint life expectancy of 24.63 years; Darr and claimant Mollie Darr had a joint life expectancy of 21.04 years.

46. If they had survived, Muth and Darr both would have retired upon reaching the age of 65. On October 26, 1956, therefore, Muth had a work expectancy of 23 years,

6 months, and Darr had a work expectancy of 18 years, 2 months.

47. Muth and Darr each spent 25% of his income on himself.

48. Claimants Catherine Muth and Mollie Darr each received $12,500.00 from CBS in exchange for a covenant not to sue.

49. Muth and Darr each would have received biennial wage increases of 4% from the expiration of the present contract until the date of their retirement.

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No. 733

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioner,

vs.

HARRIET M. ATLASS AND CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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INDEX

PAGE

LIST OF AUTHORITIES.

Thomas Love Peacock, "The Misfortunes of Elphin" .. 3

Richard E. Erwin, "Defense of Drunk Driving Cases" 3

Gullivers Travels 6

Sullivans Law Director, 1963-64 4

STATUTE.

46 U.S.C.A. #688 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 733

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

DARR WAS NOT INTOXICATED.

With flagrant disregard for factual accuracy, the respondents begin their reply as follows: (page 2, Reply)

> "The leading facts are not complicated. They are not disputed any more. *Two* men got drunk, one of them so helplessly drunk that he could not stand

> up if he were not held up whether it was noon or midnight. He fell, first in the street when two men were trying to hold him up, and a few minutes later off a shipyard's dock; whereupon *the other intoxicated man* (then the only one trying to hold him up), jumped in after him because, *as the trial court observed, he also was drunk,* and both drowned." (emphasis throughout ours)

Nothing could be more misleading than the above respondents' statement wherein it is stated that the *trial court* characterized Darr as being "*drunk*" immediately prior to the tragedy in controversy.

On April 17, 1964, the trial court judge made the following remark as a result of a colloquy with counsels Liebenson and Yowell: "* * * But I am satisfied that Darr was not sober, in the *cold stone sense* at the time, * * *." (App. 61)

Thereafter, on June 12, 1964, the same trial judge entered his findings of fact including #40, which pertains to Darr's imbibing and reads as follows: (Pet. #733, App. 24A)

> "40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. *Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr.* Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death." (Emphasis throughout ours)

Almost two months elapsed between the trial court's remarks regarding Darr's sobriety, qualified with the

words, "*in the cold stone sense*", and the same court's official finding of fact #40 supra.

In reflecting the meaning of *sobriety* as qualified by the trial court supra, one is somewhat forced into conjecture to determine the trial court's exact meaning. Sober, "*in the cold stone sense*" can only mean that one has not ingested as much as one alcoholic beverage. Once ingestion of any alcoholic beverage has taken place, the subject can no longer be regarded as sober "*in the cold stone sense*". Therefore, to qualify as being sober "*in the cold stone sense*" can only mean *complete abstinance* from any form of alcoholic beverage.

What constitutes intoxication is excellently illustrated in Richard E. Erwin's, "Defense of Drunk Driving Cases" (Sec. 13.04, pages 161-163).

It would appear that the following poetic reference is appropo:

> "Not drunk is he who from the floor
> Can rise alone and still drink more;
> But drunk is he, who prostrate lies,
> Without the power to drink or rise."
>
> "The Misfortunes of Elphin" (1829)
> Chapter 3
> Translated from the Welsh by Thomas Love Peacock
> (1785-1866)

Nevertheless, applying the intendment most favorable to claimant-appellant Darr's position, based on all the evidence in the record, leaves the inescapable conclusion that *Darr was not intoxicated* immediately prior to the tragedy in question.

It is not denied that Darr, to an *unknown degree,* imbibed immediately prior to the tragedy; however,

mere imbibing is not proof of intoxication. According to the record, Darr could not possibly have done all the things he did immedately prior to his drowning, had he been intoxicated.

Further reference regarding Darr's intoxication is made when the court below (CA-7) refers to Darr "*in a staggering condition*" (Pet. #733, App. 7A), meaning "*staggering drunk*".

This reference is most misleading, unfortunate and based on a misconception. There is no evidence in the *entire* record to justify such an untruth, and neither does the respondent refer to the record of the trial court for substantiation any more than the court below (CA-7) did in rendering its opinion. (There was *no new evidence* presented to the court below, supra, on appeal from the trial court).

The record discloses the following evidence relative to *Darr's staggering*; Smith, a *hostile* witness, testified that when they (Muth, Darr and Smith) got out on the dock, Muth and Darr were not walking O.K.—*Darr was trying to hold Muth up to keep him from staggering too much.* (Tr. 720, App. 52).

*Elsie Gifton, a bar maid, in her evidence deposition, stated that she saw 3 men on the street at approximately 2:30 A.M. on October 26, 1956, through a saloon window,

---

* Elsie Gifton admitted that a Mr. Simpson called on her on 3 different occasions to discuss this matter (H. J. Simpson, 135 S. LaSalle St., Chicago 3, Illinois, Room 2500—new phone #346-7475. According to Sullivan's Law Directory, 1963-1964, page 150, this is the office of Edward B. Hayes, attorney for appellee.) (TR. 961, 964 App. 37, 38). She further admitted that the night prior to her evidence deposition one of the counsel for Atlass went over her testimony and a number of questions were written down at the time. (TR. 965 App. 39.

while peering into the darkness of the early morning hours and that she recognized one of them as being Smith; that he was in the middle trying to hold up a man on each side of him; that the two men, other than Smith, appeared drunk. She could not describe the men and her testimony was inconsistent with the testimony of all other witnesses, including Smith (App. 33-43). Elsie testified without benefit of visual accuracy, breath odor, condition of speech, coordination and so forth.

The trial court obviously gave little if any credence to Elsie's deposition as evidenced by said court's findings of fact. Even the respondents in their reply, "* * * He fell, first in the street when *two men were trying to hold him up,* and a few minutes later off a shipyard's dock."; (page 2, Reply) refused to take Elsie's testimony seriously as the "*two men*" *referred to are Smith and Darr.*

Therefore, if Darr was *staggering,* he was not doing so because of *intoxication* but only from the *burden of keeping Muth from falling off of his feet.* After all, Darr was slender and light in weight (135-140 pounds), whereas Muth was stocky and weighed more (165-170 pounds).

There is no doubt that after Atlass temporarily left for Chicago and placed Johnson, his agent in charge, that under the circumstances it was difficult to keep the crew happy and satisfied under the trying conditions then existing, and this becomes more obvious when we note that one of the crew members quit. After all, living without mess facilities, in cold, unheated sleeping quarters with no toilet facilities in said quarters, and with no hot water for bathing or shaving because the yacht (crew's living quarters) was on a marine rail was not exactly a reason for the crew members to become ecstatic.

Nevertheless, it was improper for Johnson, as Atlass' agent in charge, in his zealous effort to keep the crew intact and happy, to indulge the crew members with alcoholic beverages during this period of inconvenience at an intermediate port while the employer's vessel was undergoing minor repairs. Therefore, (1) Darr was not intoxicated and, (2) he had some alcoholic beverages prior to the tragedy; however, (3) indulgence in alcoholic beverages is not of itself proof of intoxication, and (4) if Darr was staggering, it was not from intoxication but from the burden of keeping a helplessly intoxicated Muth on his feet. It therefore appears that respondents sole purpose in filing a single reply to Petitions #709 and #733 is to paint *both* Muth and *Darr* with the same brush, labeling them *intoxicated* contrary to the *trial court's findings.*

The decision of the court below (CA-7) somewhat reminds us what Jonathan Swift said about lawyers in 1727: (Gullivers Travels, "A Voyage to Houyhnhnms" Chapter V)

> "It is a maxim among these lawyers, that whatever hath been done before, may legally be done again; and therefore they take special care to record all the decisions formely made against common justice, and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and they are so lucky in this practice, that it rarely fails of decrees answerable to their intent and expectation."

The field of maritime personal injuries for the past two decades has offered an excellent refutation of Swift's observations simply because the tendency of the courts has been to liberalize the applicable rules in order that

unjust and equitable results will not inure to the injured victim; especially is this true of *remedial legislation* such as the Jones Act (Title 46 U.S.C.A., Sec. 688).

Wherefore, petitioner prays for the relief requested in her original petition.

Respectfully submitted,



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No. 709

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, deceased,

Petitioner,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI WITH ADDITIONAL APPENDIX.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 709

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, deceased,

Petitioner,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. Leslie Atlass,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The joint brief in opposition filed herein and in No. 733, entitled "Reply to Petitions for Certiorari," discloses no matter or grounds why the cause should not be reviewed by this Court. The brief fails to comply with paragraphs 3 and 5 of Rule 40.

1. The petition does not violate paragraph 4 of Rule 23.

Respondents characterize the petition as containing "extravagant and unwarranted assertion and assumption," "insinuation," "incorrect and elided statements," and as being "merely fictional." Yet, at no point does

the brief in opposition show any inaccuracy in the petition. We respectfully submit that contrary to such characterization the petition for writ of certiorari has been prepared with studied accuracy.

2. The questions presented do arise on the record.

Respondents argue without support in the record that the questions presented do not arise. They present no substantial argument why the cause should not be reviewed by this Court if, as is the fact, the questions are present.

3. As to employer negligence the cause is not governed by the Concurrent Findings Rule.

The basis of decision of the district judge that Atlass was liable under the Jones Act for the deaths of his seamen employees proximately caused by the breach of his duty to provide a safe means of ingress to the vessel (App. 79) was recognized by respondents (Brief of Petitioners-Appellees and Cross-Appellants, p. 78) and the Court of Appeals (App. B in the Petition for Writ of Certiorari, p. 4a).

As was shown in the petition, pages 6-7, 9, 19-20, the trial judge's findings (App. 78) and statements (App. 60-61) regarding Atlass's *personal* responsibility or *personal* negligence were made in the context of the limitation of liability issue. The trial judge stated that he made the finding in the context of privity and knowledge (TR. 1655-1657, Appellant's Brief 37-38) The only finding of fact in support of the conclusion that Atlass was not personally responsible was the fact that he was in Chicago at the time of the drownings in Detroit. (App. 78) The uncontroverted evidence established that prior to returning to Chicago he had been at the scene

and had had an opportunity to know of the conditions for access. (App. 17, 22, 26, 28, 31, 49) Respondent's counsel conceded that general conditions were the same when Atlass was present. (App. 30) The burden of proving want of knowledge was upon respondents.

There is a suggestion, at page 8 of respondent's brief that Atlass as Muth's employer was not chargeable with the hazardous "permanent conditions at the shipyard," which included the 32 inch gap, the stanchions and cross-bars, planking on the walkway and inadequate lighting. Such suggestion overlooks the doctrine that the duty to provide a safe place of employment is not limited to the employer's own premises. *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U.S. 326, 331, 332 (concurring opinion of Mr. Justice Clark), 78 S. Ct. 758; *Shenker* v. *Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7; 83 S. Ct. 1667; *Cf. Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 211-212, 83 S. Ct. 1185. These opinions recognize the non-delegable nature of this duty. Moreover, the evidence in the instant case was that the shipyard did not undertake to supervise, control and care for the crews of vessels that were left on board during repairs, (App. 33) and that when Atlass left he placed Frank Johnson in charge of the crew. (App. 29, 74).

4. The Court of Appeals did not apply the proper standard of review.

Respondents argue that the Court of Appeals merely made "corrective comments" and "correction of the findings," and that it merely reassessed Muth's and Darr's degree of intoxication. Then, so the argument progresses, in light of this new "predicate", the court

below properly redetermined the "real reason for the occurrence." (Brief in Opposition, pp. 9-16).

The "corrective comment" that Muth was in a helpless condition did not warrant a factual determination by the Court of Appeals that the sole proximate cause of his death was his own gross misconduct. *McAllister* v. *United States*, 348 U.S. 19, 75 S.Ct. 6.

Both the Court of Appeals and respondents err in re-evaluating the accessibility of the "inshore route" and inferring that Muth and Darr were negligent in failing to use it. The trial judge found that "access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. * * * The north side of the railbed along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks * * *." (App. 75, 76). This finding was supported by substantial evidence including photographs of the scene showing the presence of the scaffolding and debris taken on the day of the drowning. (Claimants' Ex. 40, 41, 42, *infra*, Additional App., pp. 1, 2 and 3, Received in evidence, Tr. of Proceedings, p. 94).

In undertaking to return to the vessel, Muth and Darr neither assumed the risk of the hazardous means of access, *Tiller* v. *Atlantic Coastline R. Co.*, 318 U.S. 54, 63 S. Ct. 444, nor can be deemed contributorily negligent, no safe way being provided. *Smith* v. *United States*, C.A. 4, 1964, 336 F. 2d 165.

5. Petitioner's point that any prior misconduct of Muth was rendered remote by an intervening agency has been in the case since the matter was in the trial court.

Respondents argue inaccurately and without regard for the record that petitioner raised this point for the

first time in the petition for rehearing below. The point was made in the trial court (R. 127), in appellants' brief in the Court of Appeals (pp. 49-52) and in the reply brief. (p. 16).

The point has never been that the intervening cause "bears the whole responsibility," as respondents say, but it is that the intervening cause renders the prior conduct remote.

The question in *McDonough* v. *Buckeye S. S. Co.*, 103 F. Supp. 473, 477 aff. 200 F. 2d 558, as stated by the trial court in that case, was whether "the plaintiff is precluded from recovery because of decedent's own misconduct." In *McDonough*, as well as in *Black* v. *New York N.H. and H.R. Co.*, 193 Mass. 448, and *Panor* v. *Northwestern Elevated Railway Co.*, 228 Ill. App. 162, 178, the prior negligence or wrong was not a proximate cause because of the intervening agency.

While Smith's negligence may not have been chargeable to Atlass under the decision in *Robinson*, nevertheless the failure to provide a safe means of ingress, which was also a proximate cause, was chargeable to him. *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U.S. 500, 506-507, 77 S. Ct. 443, 448-449.

Respondents fail to demonstrate the absence of conflict between the holding below and the Sixth Circuit in affirming *McDonough* v. *Buckeye Steamship Co.*, 103 F. Supp. 473, aff. C.A. 6th 1952, 200 F. 2d 558. *Robinson* v. *Northeastern S. S. Corp.*, 228 F. 2d 679, did not turn on the issue whether the employee's conduct was rendered remote by an intervening agency. Nor did it turn on the question whether the injured employee was in the scope of his employment. In fact, the same circuit

in *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225, 228, recognized that the plaintiff's decedent, the helpless seaman in *Robinson*, was within the scope of his employment. The *Robinson* case turned on the question whether the negligence of a fellow employee who undertook to care for the helpless seaman, was chargeable to the employer. As we have many times repeated, Atlass's liability arises not from that negligence but from the breach of the non-delegable duty to provide a safe means of ingress, which the district judge clearly determined was a proximate cause. (App. 59, 79, Petition for Rehearing p. 7, Tr. 1664-1665) Apparently what respondents overlook is that some findings of fact can be more in the nature of conclusions of law and some conclusions of law can include findings of fact. They have omitted the conclusions of law from the appendix to their brief.

6. The subsidiary questions are important and may be decided here.

Respondents argue that the subsidiary questions upon which the petition concededly is not based need no response. The only response offered is an argument that life saving equipment (two life rings on the port rail *opposite* the starboard boarding area and life preservers below and on deck) were "readily available", and wouldn't have done any good anyway.

The subsidiary questions present important legal issues. As the Court of Appeals did not reach them, we did not regard them as sufficient in themselves to form the basis of our petition. Nevertheless, should this Court grant certiorari respondents advance no reason why this Court may not decide the subsidiary questions presented as well, thus bringing to a conclusion approximately nine years of litigation.

The power of this Court in reviewing a decision of the Court of Appeals on certiorari is not limited to the correction of error in a judgment entered below, but includes the power to make such disposition of the case as justice may at the time require. This Court has the power to dispose of all questions arising on the record. 28 U.S.C., §2106; *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U.S. 555, 567-568, 51 S. Ct. 248; *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S. Ct. 470.

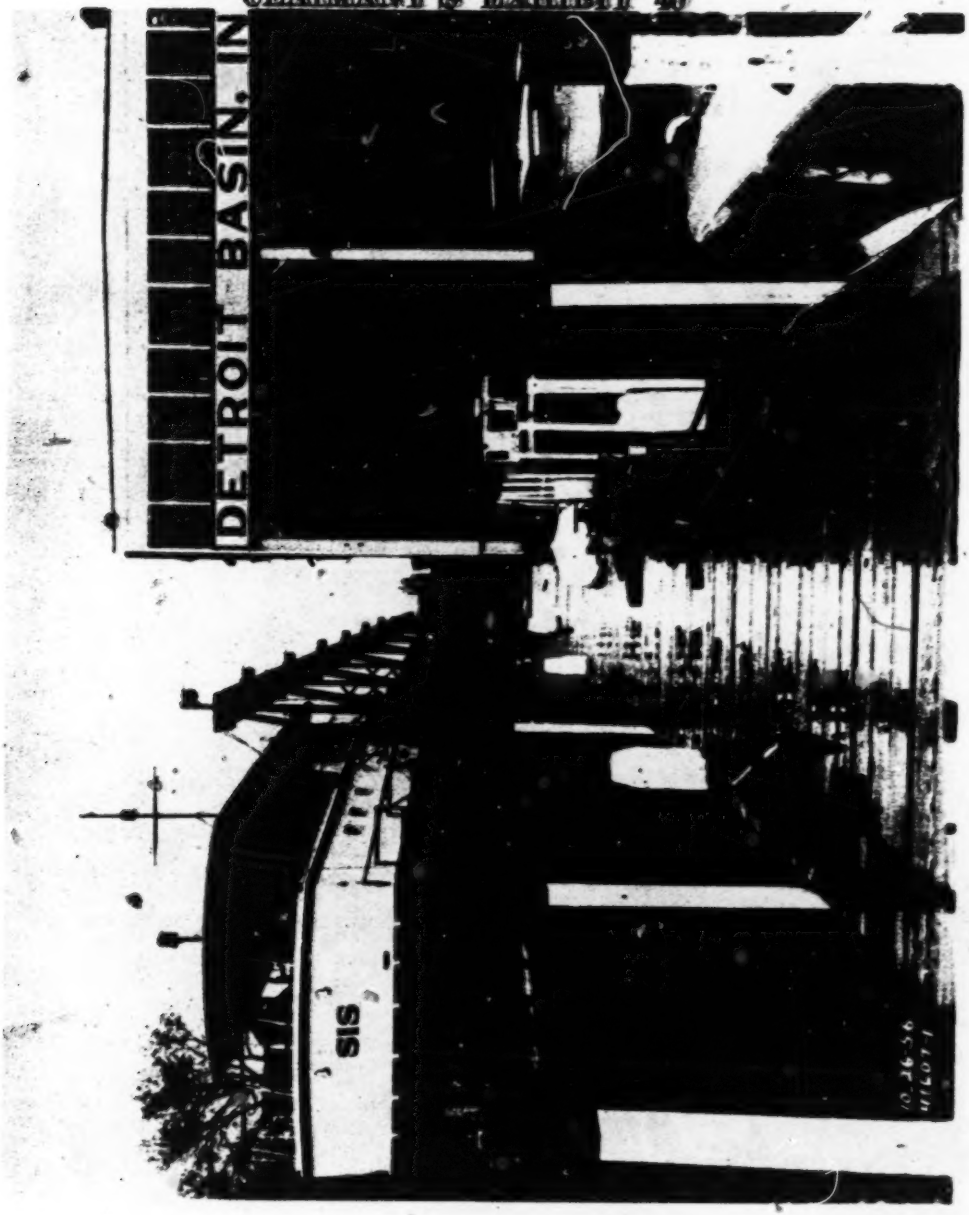
For the reasons stated in the petition, petitioner prays that this Court grant the writ of certiorari.

Respectfully submitted,

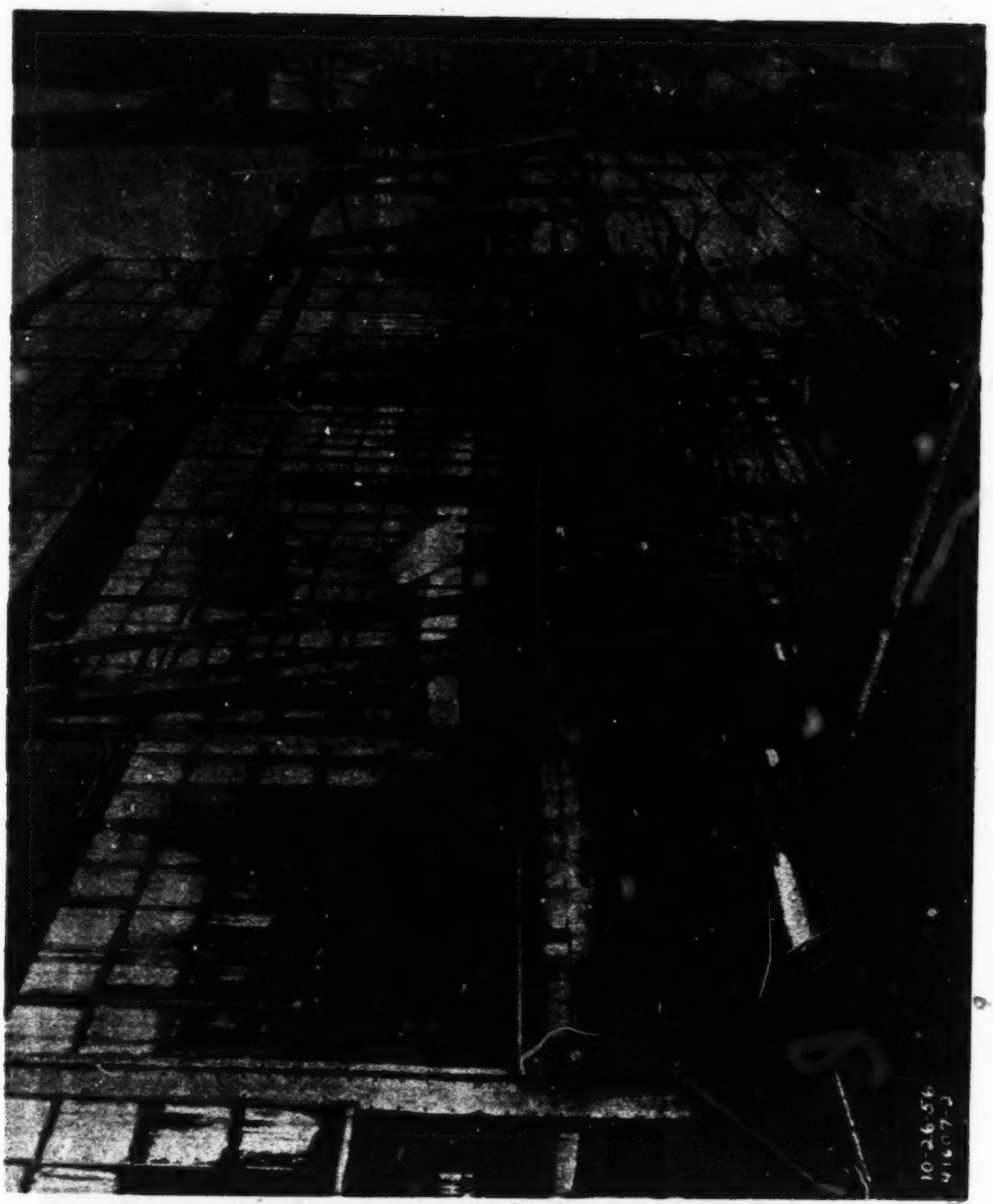
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ADDITIONAL APPENDIX

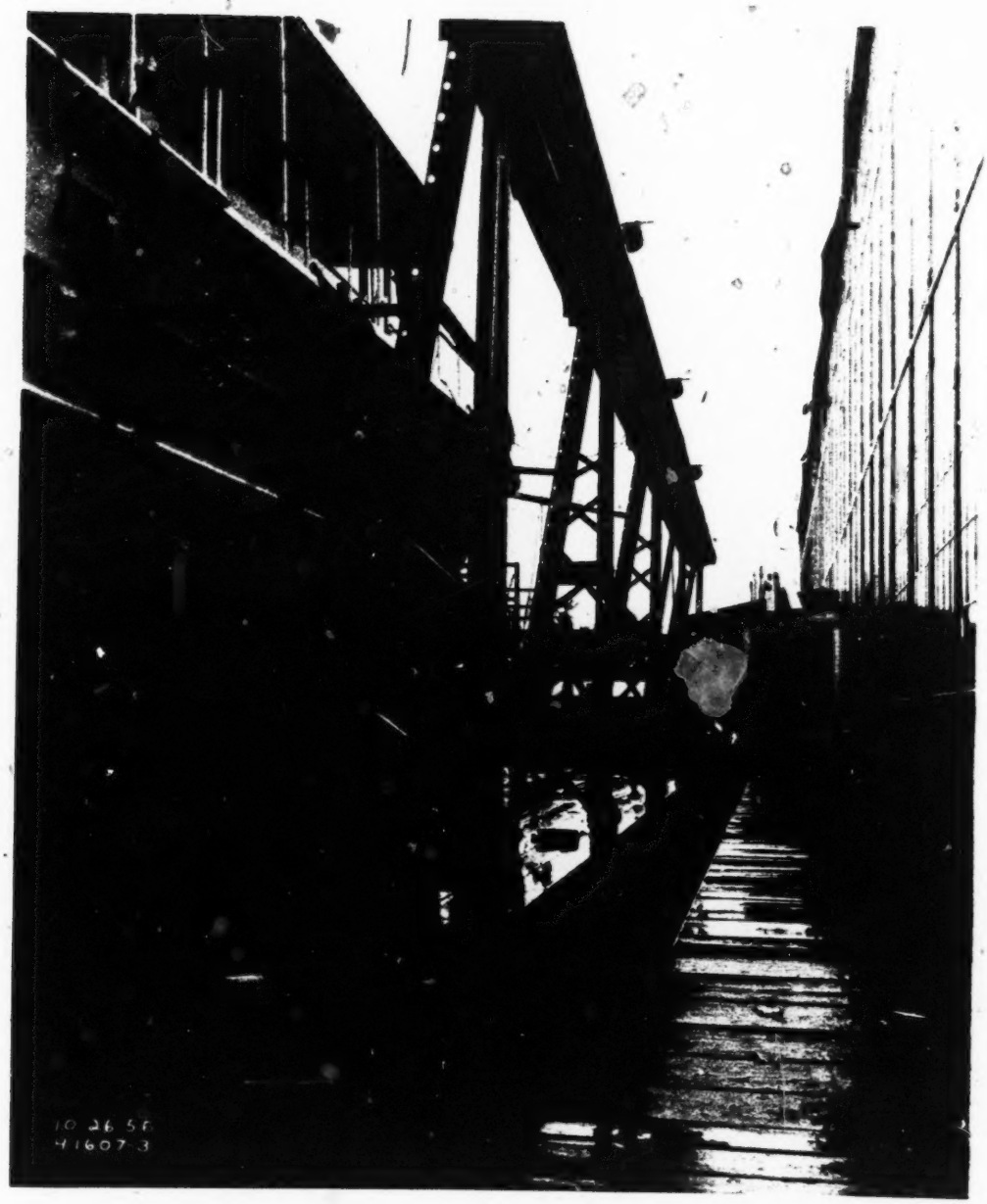
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CLAIMANT'S EXHIBIT 41



CLAIMANT'S EXHIBIT 42



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OCTOBER TERM, 1965.

Nos. 709, 733

CATHERINE MUTH, ADMINISTRATRIX OF THE ESTATE OF CLEM MUTH, DECEASED,

Petitioner,

No. 709 *vs.*

HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

MOLLIE DARR, ADMINISTRATRIX OF THE ESTATE OF KUET DARR, DECEASED,

Petitioner,

No. 733 *vs.*

HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

JOINT PETITION FOR REHEARING.

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INDEX.

PAGE

1. There Are Substantial Grounds Available to Petitioners Although Not Previously Presented 2

   A. This Case Will Be a Landmark Decision in the Seventh Circuit 2

   Chart—Overseas Export Tonnage Selected Great Lakes Ports 3

   Chart—Overseas Import Tonnage Selected Great Lakes Ports 4

   Table—Jones Act Cases Commenced in All District Courts, in All District Courts of the Seventh Circuit, and in the Northern District of Illinois During the Fiscal Years Ending June 30, 1947-1960 5

   Table—Marine Personal Injury Cases Commenced in All District Courts, in All District Courts of the Seventh Circuit, and in the Northern District of Illinois During the Fiscal Years Ending June 30, 1961-1965 6

   Table—Jones Act Appeals Filed in the Seventh Circuit Court of Appeals 1947-1960 ... 7

   Table—Number of U. S. C. A. Seventh Circuit Court Cases Reported in American Maritime Cases 1954-1965 8

   B. The Decision Below Would Work Hardship in the Seventh Circuit Upon Seamen or Their Surviving Families 9

   Bill of Costs Filed by Respondents in the Court Below 9

   C. The Opinion Below Is a Derelict for Seamen in the Seventh Circuit for Reasons Not Shown in the Petitions 10

2. There Are Intervening Circumstances Believed To Be of Substantial Effect 11

A. There Is a New Conflict in Principle With the Fourth Circuit 11

B. There Is a New Conflict in Principle With the First Circuit 12

C. There Is a New Conflict in Principle Between Different Panels of the Seventh Circuit 12

Conclusion 13

Certificate of Counsel Required Under Paragraph 2 of Rule 58 of the Rules of the Supreme Court of the United States 14

AUTHORITIES.

Cases.

Connorton v. Harbor Towing Co. (C. A. 4, November 8, 1965), 352 F. 2d 517 11

Dickinson v. Petroleum Conversion Corporation, 338 U. S. 507, 508 13

Gondek v. Pan American Airways, 382 U. S. 25..... 13

John Hancock Mut. Life Ins. Co. v. Bartels, 308 U. S. 180, 181 13

Maggio v. Zeitz, 338 U. S. 56, 59 13

McAllister v. United States, 348 U. S. 19, 20 12

McKee et al. v. Brunswick Corporation and Flagship Boats, Inc., No. 14849-52 (C. A. 7, December 14, 1965), ____ F. 2d ____ 12

O'Connor v. Venore Transportation Co., No. 6588 (C. A. 1, December 6, 1965), ____ F. 2d ____ 12

Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 34, footnote 1 14

Schriber-Schroth v. Cleveland Trust Co., 305 U. S. 47, 50 14

Statutes.

Title 28 U. S. C. § 1923(c) 10

Title 28 U. S. C. § 1925 10

46 U. S. C. §§ 183-189 11

OTHER AUTHORITIES.

Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ending June 30, 1965 6

Port of Chicago—Its Relationship to Great Lakes Overseas Traffic, 1958-1962, Draine, June 1964—Transportation Division, Chicago, Association of Commerce & Industry 2

Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts—

For the Fiscal Years Ending June 30, 1947-1960 .. 5, 7

For the Fiscal Years Ending June 30, 1961-1964 .. 6

Waterborne Commerce of the United States—Calendar Year 1962—Part 5—National Summaries, Corps of Engineers, U. S. Army, Washington, D. C., p. 9 5

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HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

JOINT PETITION FOR REHEARING.

Catherine Muth, petitioner in No. 709, and Mollie Darr, petitioner in No. 733, jointly and respectfully petition for rehearing on the following grounds:

1. There Are Substantial Grounds Available to Petitioners Although Not Previously Presented.

The order denying certiorari entered January 17, 1966, noted,

> "Mr. Justice Black is of the opinion that certiorari should be granted, the Court of Appeals judgment reversed and the District Court judgment affirmed."

The Journal of Proceedings for January 17, 1966 indicates that this Court considered some ninety other petitions for certiorari prior to reaching and passing upon these.

The Justices of this Court, being burdened with other important business, no doubt measured the importance of the questions presented *as disclosed by the petitions.* The petitions for certiorari had concentrated upon error below rather than the general importance of reviewing the Court of Appeals opinion.

Petitioners should have shown, and now seek to show the unique situation present in the Seventh Circuit which constitutes a special and important reason for granting the writs.

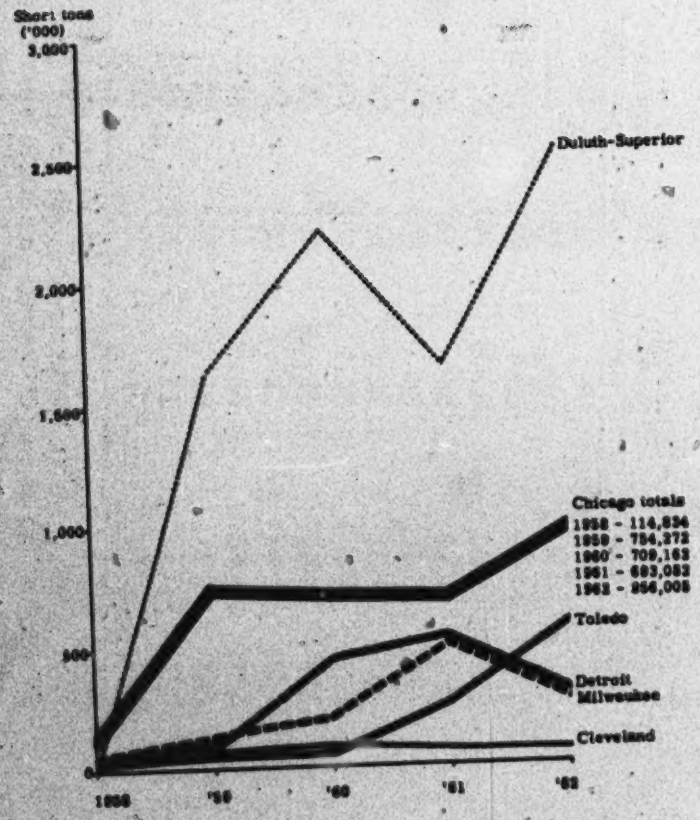
A. This Case Will Be A Landmark Decision in the Seventh Circuit.

The Seventh Circuit in years past has not been a leading maritime circuit. Even now it is not a major maritime circuit compared to the Second, Third and Fifth Circuits and to a lesser extent the Ninth. However, it is in a unique transitional stage, without a substantial body of admiralty precedents.

The improved St. Lawrence Seaway has resulted in a tremendous increase of overseas shipping within the circuit. The following charts from "Port of Chicago—Its Relationship to Great Lakes Overseas Traffic, 1958-1962," by Edwin H. Draine, published June 1964 by the Transportation Division, Chicago Association of Commerce & Industry, illustrate this surge in one aspect of maritime traffic.

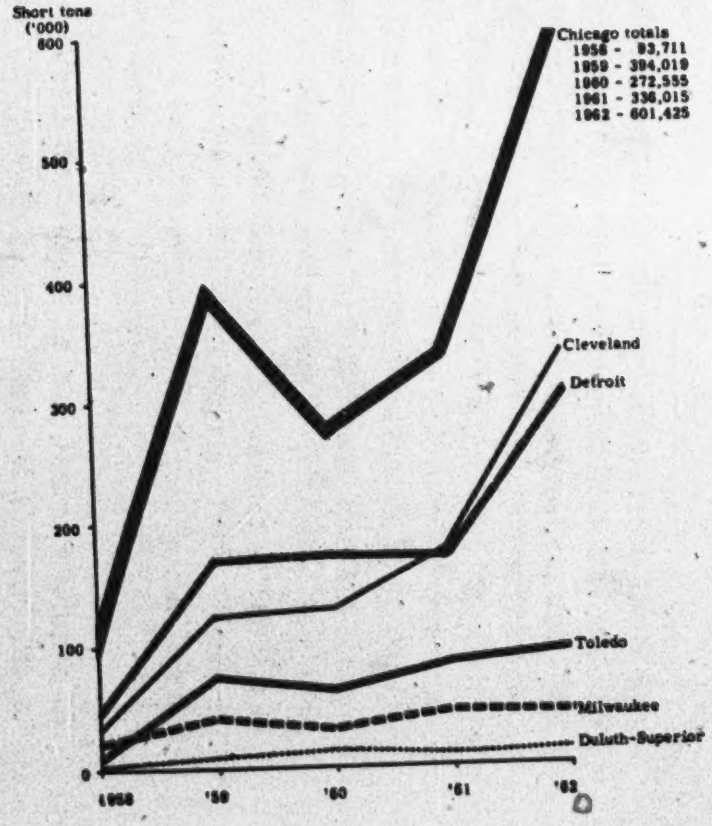
3

OVERSEAS EXPORT TONNAGE
Selected Great Lakes Ports
1958 - 1962 (Short tons)



4

OVERSEAS IMPORT TONNAGE
Selected Great Lakes Ports
1958 - 1962 (Short tons)



The 1962 total of foreign tonnage on the Great Lakes was "55.6 per cent greater than in 1959, the first year that the St. Lawrence Seaway was opened to navigation, and 760.9 per cent greater than the year immediately preceding opening of the seaway." *Waterborne Commerce Of The United States—Calendar Year 1962—Part 5, National Summaries,* Corps of Engineers, U. S. Army, Washington, D. C., page 9.

The import-export traffic for 1965 for the Port of Chicago, measured in short tons, more than doubled that for 1962.

The following tables show how the number of Jones Act cases commenced within district courts of the circuit is increasing at a far greater rate than the rate for *all district courts combined.*

JONES ACT CASES COMMENCED IN ALL DISTRICT COURTS, IN ALL DISTRICT COURTS OF THE SEVENTH CIRCUIT, AND IN THE NORTHERN DISTRICT OF ILLINOIS DURING THE FISCAL YEARS ENDING JUNE 30, 1947-1960.

Fiscal Year	In All District Courts	Page*	All District Courts of the Seventh Circuit	Northern District of Illinois Cases	Page*
1960	2645	241	60	57	239
1959	2615	187	44	38	189
1958	3054	165	65	61	167
1957	2712	177	59	56	179
1956	2392	217	52	47	219
1955	2067	169	52	45	171
1954	2253	157	27	26	159
1953	2463	151	10	9	153
1952	2227	129	19	19	131
1951	1734	133	17	16	135
1950	1716	145	15	13	147
1949	1620	133	16	14	135
1948	1574	135	11	11	137
1947	1607	111	10	10	113

* Page references are to the particular annual reports which are contained in *Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts* for the year indicated.

From this table it can be seen that the average number of Jones Act cases commenced in all districts in 1959 and 1960 was 165% more than the average for the fiscal years 1947 and 1948; yet for the same years the average number of Jones Act cases commenced in the Seventh Circuit was 500% more.

Beginning with the annual report of 1961 the Director of the Administrative Office of the United States Courts reported Jones Act cases with other maritime personal injury cases under the caption "Marine Personal Injuries." While the number of marine personal injury cases commenced in all districts of the nation increased from 1961 to 1965 approximately 119%, the increase in the Seventh Circuit was 183%.

MARINE PERSONAL INJURY CASES COMMENCED IN ALL DISTRICT COURTS, IN ALL DISTRICT COURTS OF THE SEVENTH CIRCUIT, AND IN THE NORTHERN DISTRICT OF ILLINOIS DURING THE FISCAL YEARS ENDING JUNE 30, 1961-1965.

Fiscal Year	In All District Courts	Page*	All District Courts of the Seventh Circuit	Northern District of Illinois	Page*
1965	5816	—	97	73	—
1964	5375	221	74	54	223
1963	5078	201	76	68	203
1962	5180	199	73	52	201
1961	4889	240	53	42	242

* Page references are to the particular annual reports as published in *Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts* for the year indicated.

However, the following table shows that the impact of this increased litigation has not greatly affected the Seventh Circuit Court of Appeals.

JONES ACT APPEALS FILED IN THE 7TH CIRCUIT COURT OF APPEALS 1947-1960 BASED ON ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.

	Seventh Circuit Appeals	Page [*]
1960	1	222
1959	1	178
1958	2	156
1957	0	168
1956	0	208
1955	1	160
1954	0	146
1953	1	142
1952	1	120
1951	3	124
1950	0	136
1949	0	124
1948	2	127
1947	0	102

The annual reports after 1960 do not give this information as to Jones Act cases.

---

* Page references are to the particular annual reports contained in *Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts* for the year indicated.

Some measure of the activity of the Seventh Circuit in Jones Act and Limitation of Liability cases, not shown in the annual reports of the director may be gleaned from the following table.

NUMBER OF USCA 7TH CIRCUIT CASES REPORTED IN AMERICAN MARITIME CASES 1954-1965.

	Total 7th Circuit Maritime Cases	7th Circuit Jones Act Cases	7th Circuit Limitation of Liability Cases
1965	3	3	1
1964	3	0	0
1963	7	1	1
1962	1	0	0
1961	2	0	0
1960	1	0	0
1959	6	0	1
1958	1	0	0
1957	3	0	0
1956	0	0	0
1955	3	0	0
1954	1	0	0

Courts and litigants naturally tend to look for and use precedents from within their own circuit. Undoubtedly *because of the paucity of current decisions* by the Seventh Circuit in Jones Act and Limitation cases, the decision below will stand as a landmark. It will affect results in many cases which will most certainly arise within the circuit. Especially is this true if the order denying certiorari is not vacated. No matter how many times this court admonishes that the denial of certiorari represents no opinion on the merits, lower courts and counsel continue to attach significance to such orders. This view may be fortified from the fact that in this particular federal area (the Jones Act) the Court has been responsive to rights of seamen or their surviving families. The view will be that here no substantial rights were infringed.

B. The Decision Below Would Work Hardship Upon Seamen and Their Surviving Families.

As Mr. Justice Black specially noted, the decision below is erroneous. When followed, as surely it will be by District Courts in the Circuit, it will generate more erroneous decisions. But seamen, or their families, are not ordinarily in a position to appeal.

It is a fact of life well illustrated by the figures within the Seventh Circuit that there are few appeals from District Court Jones Act cases. The reports of the director of the administrative office show that nationally in the period 1947-1960 only about 8% of Jones Act cases terminated with contested judgments from which an appeal could be taken. But also, seamen, or their personal representatives are not ordinarily in a position to finance appeals and this case is no exception. To illustrate the expense involved, we call attention to the fact that on January 11, 1966, prior to this Court's January 17, 1966 order, respondents filed in the court below a motion to tax costs against petitioners, with a bill of costs attached as follows:

BILL OF COSTS.

1.	Fees of the Clerk		$ 30.00
	Filing Notice of Appeal.....	$ 5.00	
	Docket Fee	25.00	
2.	Copy of Transcript Below necessarily required for use in the case		1,877.20
3.	Fees and Disbursements for Printing		1,643.76
	Supplemental Appendix	964.90	
	(Affidavit of Sheffer Press, Inc. already on file in this action)		
	Appellees-Cross-Appellants' Brief	593.46	
	Reply Brief to petition for rehearing	85.40	
4.	Proctors' fees under:		175.00
	28 U.S.C.A. 1923 (a)	100.00	
	28 U.S.C.A. 1923 (c)	75.00	
	Total.....		$3,725.96

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

EDWARD B. HAYES, being first duly sworn, deposes and says that he is the attorney of record for Petitioners-Appellees and Cross-Appellants and that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed in connection with the appeal in the captioned.

/s/ EDWARD B. HAYES.

Subscribed and sworn to before me this 10th day of January, 1966.

/s/ BEATRICE L. MCMANUS,
Notary Public.

This is, of course, a padded and untimely bill of costs, seeking after judgment not only the maximum costs allowable in Admiralty appeals for printing briefs of the successful party under Title 28 U. S. C., § 1923(c), but also on top of that respondents' actual brief printing costs and other District Court costs not allowed by that court and for which no error was assigned in respondents' cross appeal. While we can hope that the court below will deny all or part of it, 28 U. S. C., § 1925, nevertheless it illustrates the expense, seamen, or as here, their surviving families may be put to, in addition to their own printing and court costs, and shows why they cannot afford to appeal from District Court decisions.

C. The Opinion Below Is a Derelict for Seamen in the Seventh Circuit for Other Reasons Not Shown in the Petitions.

The first three paragraphs of the opinion below indicate that an employer liable for the deaths of seamen-employees proximately caused by the failure to provide a safe means of ingress to the vessel, *may have limitation of liability under the Limitation of Liability Act* (46 U. S. C. § § 183-189), *if the injured employees are contributorily negligent.* (App. 4A-5A to Petition for Certiorari No. 709, 350 F. 2d 592, 593.) This *non sequitur* confounds privity and knowledge on the part of the employer with comparative negligence.

Moreover, and closer to its basic error, it reads maintenance and cure into the Jones Act, saying (App. 10, 350 F. 2d 592, 596) "This perhaps is a pertinent point to make some observation as to the legal effect which the courts have given *to the rights of a seaman to recover under the Jones Act for maintenance and cure,* or for damages for injuries sustained as are sought in the instant case." [Italics supplied.]

While conflicts between the decision below and those of the major maritime circuits may not be regarded as substantial if the latter can be counted upon to follow their own precedents, injured seamen in the Seventh Circuit will be at a marked disadvantage.

2. There Are Intervening Circumstances Believed to Be of Substantial Effect.

A. There Is a New Conflict in Principle With the Fourth Circuit.

On November 8, 1965, one week subsequent to the filing of the petition for certiorari in No. 709, and two days before that in No. 733, the United States Court of Appeals for the Fourth Circuit in a Per Curiam opinion, *Connorton*

v. *Harbor Towing Co.*, 352 F. 2d 517, held that it was not a proper forum to refight a battle of expert witnesses. Yet, the Seventh Circuit then ignoring the principle in *McAllister* v. *United States*, 348 U. S. 19, became such a forum in the instant case.

B. There Is a New Conflict in Principle With the First Circuit.

On December 6, 1965, the First Circuit in *O'Connor* v. *Venore Transportation Co.*, No. 6588, . . . F. 2d . . . held and said:

> "It is fundamental that in reviewing a judge tried issue, we are not to substitute our judgment for that of the District Court, *Evans* v. *United States*, 319 F. 2d 751, 753 (1st Cir. 1963), but may reverse only where, upon a consideration of the entire record, we are 'left with a definite and firm conviction that a mistake has been committed.' *McAllister* v. *United States*, 348 U. S. 19, 20 (1954)."

C. There Is a New Conflict in Principle Between Panels of the Seventh Circuit.

On December 14, 1965 a different panel of the Seventh Circuit, (Schackenberg, Castle and Kiley, *JJ*) speaking through Mr. Justice Kiley, who was a member of the panel below, recognized the *McAllister* rule. *McKee, et al.* v. *Brunswick Corporation and Flagship Boats, Inc.*, No. 14849-52, ... F. 2d .....

As in the instant case, the factual findings of the District Court in the *McKee* case did not precisely show the basis of liability, but the court said:

> "We have experienced no difficulty in learning from the findings and the non-burdensome references to the 'Appendix' the bases of the Court's conclusions as to liability * * *"
>
> * * * * *
>
> "The findings of the court as to Mallory's negligence and the proximate cause of the explosion do not leave

> us with a 'firm conviction that a mistake has been committed,' and are not clearly erroneous. *McAllister* v. *United States,* 348 U. S. 19, 20 (1954) and the conclusion of its liability is not erroneous."

Not only does this subsequent decision of a different panel of the Seventh Circuit show an intervening awareness of the proper standard of review analogous to that involved in *Gondeck* v. *Pan American Airways,* 382 U. S. 25, but it shows a conflict within the same circuit such as formed the basis for a grant of certiorari in *John Hancock Mut. Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 181; *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507, 508 and *Maggio* v. *Zeitz,* 338 U. S. 56, 59.

Conclusion.

For the grounds shown in this petition we pray this Court to reconsider its denial of the petitions for certiorari and upon such reconsideration to grant the petitions for writs of certiorari.

Respectfully submitted,

G. KENT YOWELL,
Counsel for Petitioner in No. 709.

HAROLD LIEBENSON,
EDWARD G. RASZUS,
Counsel for Petitioner in No. 733.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing joint petition for rehearing is presented in good faith and not for delay. We further certify that it is restricted (a) to substantial grounds available to petitioners although not previously presented *Schriber-Schroth* v. *Cleveland Trust Co.*, 305 U. S. 47, 50 and (b) to intervening circumstances, being decisions rendered and reported subsequent to the filing of the petitions for certiorari, showing conflicts with other circuits and within the Seventh Circuit and believed to be of substantial effect. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, footnote 1.

G. KENT YOWELL,
Counsel for Petitioner in No. 709.

EDWARD G. RASZUS,
Counsel for Petitioner in No. 733.

MOTION FILED

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1965

Nos. 709, 733

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

No. 709

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, Deceased.

Petitioner,

versus

HARRIET ATLASS and Chicago Title & Trust Company, Executors of the Will of H. Leslie Atlass,

Respondents.

No. 733

MOLLIE DARR, Administratrix of the Estate of Kurt Darr, Deceased.

Petitioner,

versus

HARRIET ATLASS, and Chicago Title and Trust Company, Executors of the Will of H. Leslie Atlass,

Respondents.

On Petition for Rehearing to Grant a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION

RAYMOND H. KIERR
1718 National Bank of Commerce Building
New Orleans, Louisiana
Counsel for Amicus Curiae

Of Counsel:
Kent A. Russell
Kierr & Gainsburgh

IN THE
SUPREME COURT OF THE UNITED STATES
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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

American Trial Lawyers Association respectfully moves for leave to file a brief *amicus curiae* in the case. The consent of the attorneys for petitioners has been obtained. The consent of the attorney for respondents was requested but refused.

The interest of the American Trial Lawyers Association arises from the fact that it is a national bar association of trial attorneys who are vitally interested in a uniform development of admiralty and maritime law in a manner consistent with the protection and furtherance of the rights of seamen and other persons similarly situated. The association publishes legal periodicals and follows the development of the admiralty and maritime law under the supervision of its special section on admiralty law.

In the instant case, although petitioners have previously presented their contentions, your applicant believes that further discussion should be devoted to the question of whether the court below has correctly interpreted the proper standards of review in reversing the findings and judgments of the district court. It is believed that the accompanying brief, which *amicus curiae* is requesting permission to file, contains a more

complete discussion of this issue. If this argument is accepted it would be dispositive of this case.

Respectfully submitted,

Raymond H. Kierr
Attorney for
American Trial Lawyers
Association

OF COUNSEL:
Kent A. Russell,
Kierr & Gainsburgh

INDEX

Page

1. Motion for Leave to File Brief as Amicus Curiae 2

2. Brief of Amicus Curiae Filed on Behalf of American Trial Lawyers Association 5

A. Statement of Interest 3

B. Statement of Facts 5

C. Reasons for Granting Rehearing and Issuing the Writ 11

D. Conclusion 15

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BRIEF OF AMICUS CURIAE FILED ON BEHALF OF AMERICAN TRIAL LAWYERS ASSOCIATION

STATEMENT OF FACTS

A petition for Limitation of Liability was filed in the United States District Court for the Northern District of Illinois praying for an exoneration from, or in the alternative, limitation of liability from claims asserted, or to be asserted, under the Jones Act (46 U.S.C.A. §688) for the death of two seamen. Their personal representatives appeared as claimants and answered the petition.

The District Court, sitting in Admiralty, rendered judgment for claimants against the petitioner as owner of the vessel and employer of the decedents. The awards were reduced by findings of contributory negligence, and the total was limited to the value of the vessel.

The District Court rendered findings of fact and conclusions of law, presumably in an effort to conform with Admiralty Rule 46-1/2.

Pertinent portions of the findings of fact, rearranged numerically to more directly present our point, are:

"16. On October 23, the yacht was placed on a ma-

rine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail from that time until after Muth and Darr drowned.

17. While she was on the marine rail, ingress to and egress from the yacht could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of midships.

36. At the time of the drowning, the "Sis" was a vessel in navigation.

18. While the "Sis" was on the marine rail, toilet and cooking facilities on board could not be used. The crew continued, nevertheless, to sleep on board. Muth, Mendel, Smith and Wasilas, among others, slept in the crew's quarters as they had each night after the vessel left Chicago. Johnson, who with Darr had been sleeping in the officers' quarters, stayed in a hotel after October 23; Darr slept in a hotel one of the nights October 23-24 and in the officers' quarters the other night. Atlass, who had slept in the master stateroom, moved to a hotel on October 23 and returned to Chicago on October 24.

19. When Atlass left Detroit on October 24, he told Johnson that he was in charge and that the yacht was to be repaired and readied to continue to Florida. Thereafter, Johnson gave directions and orders and paid for meals eaten by the men.

28. Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were

taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages.

29. Muth, Darr and Smith left Garvin's Bar together. Muth soon commenced staggering and had to be assisted by the other two. At one point, Muth slipped and fell into the street and had to be aided to his feet.

30. The three proceeded to the Detroit Yacht Basin where the outside door to the boat shed was locked. They rang for the night watchman who came, turned on the overhead lights in the shed and unlocked the door to let them pass through. As they did so, Muth was staggering and Darr, on Muth's left, was assisting him. Smith followed, a few steps behind.

31. The three men turned south down the walkway. Opposite a point between the first and second stanchions, about 15 feet south of the northern terminus of the walkway, Muth fell into the gap between the walkway and the rail bed. Immediately, Darr jumped in to try to save Muth.

32. Wasilas and Mendel, both asleep on the yacht, were awakened by Smith's cries for help. By the time they reached the walkway where Smith, who was unable to swim, was shining a flashlight into the water, Darr had disappeared from sight. Wasilas and Mendel jumped into the water to assist Muth, but they were unable to rescue him.

27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap.

37. Minimum levels of lighting recommended by the Illuminating Engineering Society are the following: general areas of shipyards, 5 foot candles; freight and passenger piers, 20 foot candles; inactive pedestrian and/or conveyor entrances normally locked and infrequently used, 1 foot candle.

38. At the time of the drowning, illumination on the walkway, dock and rail bed was less than one foot candle.

39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient.

40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had

been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

Pertinent portions of the conclusions of law are:

"2. Muth and Darr were seamen within the meaning of the Jones Act, 46 U.S.C. § 688, at the time of their deaths. See Carumbo v. Cape Cod S. S. C., 123 F. 2d 991 (1st Cir. 1941).

3. From October 18, 1956, when the voyage commenced, to and including the time of the drownings, Muth and Darr were borrowed servants of Atlass', and accordingly he was their "employer" within the meaning of the Jones Act.

4. Under the Jones Act, an employer is liable for injuries to or death of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. This duty extends to an area in close proximity with the gangway or gangplank such as the place where Muth and Darr drowned. Cf. Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945).

5. Negligence of seamen-employees which proximately contributes to their injury or death reduces

proportionately the amount of damages which may be recovered of the employer.

8. The following damages, which must be reduced by 50% (the contribution to Muth's death of his own negligence), have been sustained by claimant Catherine Muth:

10. The following damages, which must be reduced by 30% (the contribution to Darr's death of his own negligence), have been sustained by claimant Mollie Darr:"

The Seventh Circuit Court of Appeals rendered an order reversing the trial court. In holding that the intoxication of the two deceased seamen was the *sole cause* of their deaths, it in effect directed the trial court to dismiss the claimants' action.

The opinion of the appellate court found fault with the judgment of the trial court in two respects: firstly, that there was no expressed and well articulated finding of fact that the employer or his agents had been negligent in their conduct; and secondly, that there was no expressed and well articulated finding of fact that the negligence, assuming such to have existed, had played a part in causing the accident.

Lacking an expressed determination by the trial court of these findings of fact, the appellate court assumed the role of fact-finder and determined that there was no negligence nor causation.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The decision, which is the subject of the petition for writ of certiorari, involves the following conflicts, interpretations and rulings:

I. BY REQUIRING AN EXCESSIVE ADHERENCE TO ADMIRALTY RULE 46-½ THE SEVENTH CIRCUIT COURT OF APPEALS HAS IGNORED THE MANDATE OF THIS COURT IN MAKING AN OBLIQUE ATTACK UPON THE SCHEME OF APPELLATE REVIEW OF ADMIRALTY AND MARITIME CAUSES OF ACTION

Amicus curiae respectfully differs with the method by which the appellate court arrived at its reversal of Honorable Hurbert L. Will, Judge of the District Court for the Northern District of Illinois. The trial court clearly stated in his finding of fact No. 39 that the employer failed to provide a safe means of egress from and ingress to the vessel. He was doubtlessly aware of the propensity of seamen to imbibe to excess while on shore and their resulting need of a safer means to board the vessel. The standard of care due an intoxicated seaman should be higher than the standard owed to a sober seaman. Judge Will presumably decided that the lighting was inadequate to illuminate the way for helpless or partially helpless inebriated seamen. Judge Will would not have rendered judgment in favor of the claimants had he not believed it reasonable that there was some negligence that played

a part, no matter how slight, in causing the deaths of the two seamen. His conclusions of law demonstrate that he was aware of the applicable principles of law to be followed. Because there was a valid basis for reasonable inference that the employer's negligence played a part in causing the drownings, there was no opportunity for the appellate court to find that the trial judge was clearly erroneous in his findings.

The appellate court did not decide that the judgment was clearly erroneous, but rather decided that certain findings of fact were not listed by the trial judge. The Seventh Circuit Court of Appeals by its excessive adherence to Admiralty Rule 46-1/2[1] is in conflict with the Fifth Circuit decision of *Myles v. Quinn Menhadden Fisheries, Inc.*[2]

We submit that to permit the appellate court to require overly rigid adherence to Admiralty Rule 46-1/2 is to open the door for oblique attacks upon the decisions of the district court judges who have heard the evidence, have observed the demeanor of witnesses and were better situated to weigh the evidence and determine the facts.

This Honorable Court has an interest in resolving the conflict between the two circuit courts of appeal.

---

[1]Admiralty Rule 46-1/2 provides *inter alia:* "In deciding cases of of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; . . ." We submit that this rule removed the fact finding function from the appellate court by reserving this function exclusively for the trial court.

[2]302 F2d 146 (CA 5th Cir 1962)

II. THE SEVENTH CIRCUIT COURT OF APPEALS, BY MAKING INDEPENDENT FINDINGS OF FACT THAT WERE SUPPOSEDLY OMITTED BY THE TRIAL COURT, HAS CREATED A CONFLICT BETWEEN THE CIRCUITS, AND ALSO IS IN CONFLICT WITH THE RULES AND DECISIONS OF THIS COURT.

Let us assume *arguendo* that the trial court did omit crucial findings of fact upon which to base its judgment.[3] In that event the appellate court's independent determination of the omitted findings of fact is in essence a trial *de novo* as to those facts. This is contrary to Admiralty Rule 46-1/2[4] which delegates the fact finding function exclusively to the district court. It is contrary to that body of the decisional law[5] (adopted by

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[3]As discussed *supra*, the appellate court predicated its reversal on the announced theory that the trial court failed to make the requisite findings of negligence on the part of the employer or his agents which caused in whole or in part the death of the two seamen. With this we do not agree since we feel that those findings were implicit in the judgment of the Court. However, if we accept for purposes of argument that there was no such finding then the next question to be answered is which tribunal is empowered to make those initial fact determinations? The appellate court assumed that it had the power and discretion to make *new* findings of fact. Obviously non-existent findings can not be said to be erroneous findings. What then is the source of the appellate court's power?

[4]*Supra* note 1.

[5]Many of the circuit courts of appeal have ruled unequivocally that if the findings as to particular significant facts have not been made by the trial court the appellate court cannot do this for them — the case must be remanded. Jones v. Waterman S.S. Corp., 155 F 2d 992 (CA 3rd Cir 1946); Owen v. Commercial Union Fire Ins. Co. of New York, 211 F 2d 488 (CA 4th Cir 1954); Myles v. Quinn Menhadden Fisheries, Inc., 302 F 2d 146 (CA 5th Cir 1962); Clarke Hybrid Corn Co., Inc. v. Stratton Grain Co., 214 F 2d 7 (CA 8th Cir 1954); Irish v. U. S., 225 F 2d 3 (CA 9th Cir 1955); J. P. Gibbins, Inc. v. Utah Home Fire Ins. Co., 202 F. 2d 469 (CA 10th Cir 1953); Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82 (App D. C. 1944).

this court in *McAllister v. U. S.*,[6]) which requires the reviewing court upon discovery of a substantial omission in the findings of fact to remand the cause to the district court to supplement its findings of fact. The decision below, if not rectified, will stand for the proposition that the appellate court may conduct a trial *de novo* on those omitted facts; this we submit, is in conflict with the principle of law advanced by this Honorable Court in *McAllister*.

For the appellate court to reject fact findings and substitute its own, is no less a trial *de novo*. The trial judge, who heard and observed, found that the walkway was obstructed; the court of appeals reevaluates the evidence, and reaches a contrary conclusion. The district judge found that the lighting was insufficient; the appellate court disagrees, and decides that actually the illumination was adequate. The court of first impression found that the first seaman was 50% at fault, and that the second decedent who attempted the rescue was 35% at fault; the Seventh Circuit determined on appeal that the first man was 100% at fault, and likewise the rescuer was was 100% at fault.

If the ends of justice require further determination with regard to the facts, the case may be remanded for a new trial to the district court which is the proper forum for fact finding.

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[6]McAllister v. U. S., 348 U. S. 19 (1954); see also Interstate Circuit, Inc. v. U. S., 304 U. S. 55 (1938).

CONCLUSION

The decision of the court below has national significance. Other than a normal desire to prevent injustice, the *amicus curiae* has no further interest in the outcome of the proceedings between these individual litigants. However, we are of the opinion that the disturbing influence created by this decision upon the admiralty and maritime law is to be avoided and merits the attention of this Honorable Court.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon all counsel of record by placing the same properly addressed in the U. S. mail with adequate postage affixed thereto.

February 14, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

Nos. 709, 733

CATHERINE MUTH, ADMINISTRATRIX OF THE ESTATE OF CLEM MUTH, DECEASED,

Petitioner,

No. 709 *vs.*

HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

MOLLIE DARR, ADMINISTRATRIX OF THE ESTATE OF KURT DARR, DECEASED,

Petitioner,

No. 733 *vs.*

HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

MOTION FOR LEAVE TO FILE SECOND JOINT PETITION FOR REHEARING AND SECOND JOINT PETITION FOR REHEARING.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

MOTION FOR LEAVE TO FILE SECOND JOINT PETITION FOR REHEARING.

Petitioners, Catherine Muth, administratrix of the estate of Clem Muth, deceased, and Mollie Darr, administratrix of the estate of Kurt Darr, deceased, by reason of the de-

cision of this Court in *Hopson* v. *The Texas Company*, No. 818, October Term, 1965, entered February 28, 1966, 34 Law Week 2393, move for leave to file a second petition for rehearing pursuant to the authority of *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183 (1956); *United States* v. *Ohio Power Co.*, 353 U. S. 98 (1957); and *Gondeck* v. *Pan American World Airways, Inc.*, 382 U. S. 25 (1965).

The United States Court of Appeals for the Seventh Circuit reversed a judgment for petitioners sustaining their claims under the Jones Act, Title 46 U. S. C. § 688, in the United States District Court for the Northern District of Illinois, after a trial before the court sitting in Admiralty in a proceeding brought by respondents' decedent for exoneration from or limitation of liability under Title 46 U. S. C. § 183. This Court denied petitions for certiorari on January 17, 1966, Mr. Justice Black dissenting, and denied a petition for rehearing on February 21, 1966. The cause is still pending in the United States Court of Appeals on respondents' motion to tax costs and petitioners' answer thereto seeking affirmative relief. The mandate of the United States Court of Appeals has not issued as of this date.

It is believed that had the *Hopson* decision been announced earlier, the result here would have been different.

Respectfully submitted,

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SECOND JOINT PETITION FOR REHEARING.

Catherine Muth, petitioner in No. 709, and Mollie Darr, petitioner in No. 733, jointly and respectfully petition for rehearing on the following grounds:

On February 28, 1966 the Court in a *per curiam* decision, Mr. Justice Harlan dissenting, held that the operational activity doctrine announced in *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U. S. 326, to give "an accommodating scope . . . to the word 'agents' " as used in § 1 of the Federal Employees' Liability Act, Title 45 U. S. C. § 61 et seq., the standards of which are incorporated in the Jones Act, Title 46 U. S. C. § 688, applied to the activity of transporting ill seamen by an independent taxicab company to a consular office in Trinidad in order for arrangements to be made for the transportation of the two seamen back to the United States, which was a necessary prerequisite to their discharge. *Hopson* v. *The Texas Company,* No. 818, October Term, 1965, ... U. S. .....

In the instant case we sought to show that the shipyard and its agents were agents of the Jones Act employer, Atlass, under the operational activity doctrine as understood from *Sinkler.* (No. 709 Reply Brief in support of Petition for Writ of Certiorari with additional appendix, p. 3.) The Court of Appeals had indicated to the contrary. (350 F. 2d 592, 599.)

If the activity in *Hopson* is within the operational activity doctrine, then certainly the activity of the shipyard company, making temporary repairs upon the vessel in this case, was an operational activity and the Jones Act employer is liable for the negligence of the shipyard in failing to maintain a safe, adequately lighted means of ingress to the vessel.

We also submit that under *Hopson* the taking of Muth and Darr from the tavern to their quarters on the vessel was an operational activity. The Court of Appeals held to the contrary. (350 F. 2d 592, 597-598.)

Clem Muth was helplessly intoxicated; he was incapable of caring for himself because of acute alcohol poisoning. In an enlightened society his condition is recognized as an illness which, of course, medically speaking, it was. He would not be left in the street where he fell in front of the cafe. (App. 36, 41-42, 57-58.)

A helplessly intoxicated seaman is not *caput lupinum;* nor is passive intoxication disqualifying gross or wilful misconduct. *McDonough* v. *Buckeye Corp.,* 103 F. Supp. 473, aff. C. A. 6, 1952, 200 F. 2d 558; *Olson, Administratrix* v. *New York Central Railroad Co.,* C. A. 2, 1965, 341 F. 2d 233; *Bentley* v. *Albatross S. S. Co.* (C. A. 3, 1953), 203 F. 2d 270, 272-274.

In *Bentley* v. *Albatross S. S. Co.* (C. A. 3 1953), 203 F. 2d 270, 272-274, the court said:

> "* * * [D]id the libellant's intoxication operate to bar his recovery of (1) damages and (2) maintenance and cure [?]
>
> "As to damages: We are of the opinion that where liability exists by reason of the vessel's unseaworthiness or negligence, an injured seaman is not barred from their recovery merely because he was intoxicated at the time of injury. Intoxication, where it contributes to a seaman's injury, constitutes contributory negligence on his part and operates only to mitigate the damages. As to maintenance and cure: It is our opinion, for reasons later stated, that under the circumstances of this case libellant's intoxication was not a bar to his recovery.
>
> "It is true that in a number of cases intoxicated seamen have been denied recovery of damages and main-

tenance and cure because they were intoxicated at the time of their injury, but an analysis of these cases discloses the absence of unseaworthiness or negligence on the part of the vessel as a factor in the situation. For example, in the S. S. Berwindglen, 1st Cr. 1937, 88 F. 2d 125,[*] where recovery of both damages and maintenance and cure were denied, an intoxicated seaman, injured in a fall from a ship's ladder which was in proper condition and well lighted, the Court noted the factor of the absence of unseaworthiness. Likewise, the United States Court of Appeals for the Second Circuit, in *Barlow* v. *Pan American S. S. Corp.*, 1939, 101 F. 2d 697, 698, in affirming a denial by the trial court of damages and maintenance and cure when an intoxicated seaman was injured when he fell from a ship's ladder noted specifically that (1) 'The ladder was in perfect condition and well lighted,' and (2) '* * * seaman's injuries occurred solely because of his intoxication * * *.' In *Lortie* v. *American-Hawaiian S. S. Co.*, 9 Cir., 1935, 78 F. 2d 819, 821, there was an affirmance of a denial by the trial court of damages and maintenance and cure where the seaman '* * * was injured during a drunken brawl * * *' which he started and neither unseaworthiness nor negligence of the vessel was a factor. * * *

"* * * We do not agree that recovery of *maintenance and cure* is forfeited by the mere circumstance that the injured seaman is intoxicated at the time.

"It is pertinent to note that the late Judge Dickinson in The Quaker City, D. C. E. D., Pa. 1931, 1 F. Supp. 840, in a case where there were absent the factors of either unseaworthiness or the vessel's negligence, held that an injured seaman's intoxication did not per se forfeit his right to maintenance and cure. He

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[*] *S. S. Berwindglen*, 1st Cir. 1937, 88 F. 2d 125 and *Barlow* v. *Pan American S. S. Corp.*, 1939, 101 F. 2d 697, are cited and relied on by the Seventh Circuit Court of Appeals in the instant case. 350 F. 2d 592, 597.

there drew a distinction between innocent involvement of an intoxicated seaman in a brawl and one who was its instigator. In the first instance there is no wilful misconduct; in the second there is, Judge Dickinson held.

"The District Court in the instant case did not apply the test prescribed in The Quaker City, supra, and ruled the libellant's intoxication to be an act of 'gross and wilful misconduct' forfeiting his right to maintenance and cure.

"* * *.

"While there has not been an express ruling on the issue by the Supreme Court,[*] that Court has, however, afforded us an illuminating guide in discussing the maintenance and cure rule in a number of cases. The sum total of observations made by the Supreme Court in these cases is that in applying the maintenance and cure rule, seamen, even though erring and careless, as wards of courts of Admiralty should be the beneficiaries of a liberal attitude in consonance 'with the dictates of sound maritime policy.'

"* * *.

"Applying these concepts of the maintenance and cure rule we are of the opinion that a seaman's becoming intoxicated while on shore leave in a foreign port on a holiday is not an act of wilful misconduct barring his recovery of maintenance and cure for injuries sustained when he slumped in a drunken stupor on an unguarded (and thus unseaworthy) hot radiator in the vessel's recreation quarters."

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* A want of an express ruling was likewise noted by the court below. 350 F. 2d 592, 596.

Frank Johnson, who was an agent in charge of the crew in Atlass' absence, took Smith, Muth and Darr to dinner (the galley on board ship being closed), accompanied Muth and Darr to a movie, and went with them to the tavern. He testified that "I don't remember the exact time that

we departed or parted company." (App. 28.) He did not assist in taking Clem Muth back to the vessel.

Smith,the Chief Engineer of the vessel, with some measure of authority over the crew himself, in undertaking to take Muth back to the vessel with the assistance of Darr, was performing an operational activity of the vessel: caring for an ill seaman.

Smith unfortunately performed this task negligently. He did not seek the assistance of the shipyard's night watchman, Gildersleeve. Under the circumstances, he should not even have attempted the return to the vessel, there being no safe way provided by the shipyard or the Jones Act employer, Atlass, for ingress to the vessel. (F. of F. 40, App. 77.) At the very least, he should have assisted Darr with Muth on the narrow, poorly lighted walkway. The Court of Appeals, however, assuming his negligence, held he was not within the scope of his employment. Under *Hopson* he was.

Darr, without assistance from Smith, was unable to manage Muth, who fell into the 32 inch unprotected, unbridged, gap between the walkway and the marine railway. Darr then jumped in to save Muth from drowning. In so doing, Darr was performing a previously recognized operational activity of the vessel. *Kirincich* v. *Standard Dredging Co.*, C.A. 3, 1940, 112 F. 2d 163, 164-165.

We respectfully petition that because of the decision in *Hopson,* which Mr. Justice Harlan describes as an extension of the doctrine in *Sinkler,* that the order of February 21, 1966 denying the petition for rehearing be vacated, that a rehearing be granted and that the petitions for certiorari be granted. We pray the Court, in its discretion, to take these cases for plenary consideration, or to vacate the judgment of the Court of Appeals and remand

these cases to that court for consideration of the questions which were not there reached.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing Second Joint Petition for Rehearing is presented in good faith and not for delay. We further certify that it is restricted (a) to substantial grounds available to petitioners although not previously presented, *Schriber-Schroth* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, and (b) to an intervening circumstance, being a decision of this Court rendered and reported subsequent to the denial of the petition for rehearing and believed to be of substantial effect. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, footnote 1.

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